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BORN FREE YET EVERYWHERE IN CHAINS*: GLOBAL SLAVERY IN THE TWENTY-FIRST CENTURY

DR. RANEE KHOOSHIE LAL PANJABI**

I. INTRODUCTION

The chasm between illusion and reality confronts us in many realms of our world today but nowhere more starkly than in the terrible realization that our global family, striding boldly into a new millennium carrying banners proclaiming the universality of human rights, still tolerates the existence of slavery, the oldest of human crimes. It has been estimated that slavery today "chains" twenty-seven million victims[1] in its cruel grip, a figure approximately equivalent to the population of Venezuela, or Malaysia, or Uzbekistan.[2]

An estimated twenty-seven million people (deemed a "conservative" number)[3] 80 percent of them women and children[4] - endure the terror and fear of being literally owned by others, their lives prey to violence and intimidation, their entire bleak sojourn on earth one of back-breaking labor and soul-searing humiliation. For them, whether they labor as peasants in Africa or toil as stone cutters in Asia or whether they work as sex slaves in almost every country, any notion that the fine-sounding phrases of the Universal Declaration of Human Rights could even be applicable or germane to their brutal existence on this earth is a travesty of the grim reality that usually only ends with death. Barbara Kralis, Analyst with RenewAmerica commented on the chasm between reality and the law

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* With apologies to JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (G.D.H. Cole trans., London and Toronto: J.M. Dent and Sons 1923) (1762), *available at* http://www.constitution.org/jjr/socon.htm (rendered into HTML and text by Jon Roland of the Constitution Society).

** Dr. Ranee Panjabi, L.L.B. (Hons.), is a Labor Relations Arbitrator and Professor of History and Human Rights at Memorial University of Newfoundland, Canada. I dedicate this article to my mother, Lata K.L. Panjabi, who, after reading abolitionist literature, urged me to research this subject. I always listen to my mother! I also dedicate this to the memory of my father, Khooshie L. Panjabi, who taught me that injustice can always be vanquished provided the good persist.

1. KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY, 8-9 (Berkeley: Univ. of California Press 1999).

2. *See, e.g.*, Gobierno Bolivariano de Venezuela, http://www.ine.gov.ve (last visited Sept. 9, 2008) (Population as of Sept. 9, 2008 is 28,006,761); Dep't of Statisticos Malaysia, http://www.statistics.gov.my/english/frameset_keystats.php (last visited Sept. 9, 2008) (Population in 2008 around 27,730,000); Central Intelligence Agency, The World Factbook, http://www.cia.gov/library/publications/the-world-factbook/geos/uz.html#people (last visited Sept. 9, 2008) (July 2008 population estimate of 27,345,026).

3. CAROLINE COX & JOHN MARKS, THIS IMMORAL TRADE: SLAVERY IN THE 21ST CENTURY, 11 (Oxford: Monarch Books, 2006).

4. iAbolish: American Anti-Slavery Group, Modern Slavery 101 Fast Facts (2008), http://www.iabolish.org/modern_slavery101.

stating that "[n]o government in the world today officially endorses slavery. Banned worldwide, slavery thrives in every nation on the face of the earth."[5]

Most horrifying of all is the fact that this terrible crime, now universally declared illegal even though it prevails globally, holds millions of children in its grip. The United Nations estimated in 2004 that 700,000 children were forced into domestic servitude in Indonesia; 559,000 in Brazil; 264,000 in Pakistan; 200,000 in Kenya; and 250,000 in Haiti.[6] These millions of children are deprived of healthcare, decent food, a normal family life, education, and all the rights that the United Nations has proclaimed as fundamental in a plethora of international covenants.[7]

The enslavement of children, particularly young children, is the most heinous form of cruelty. However, one cannot overlook the fact that millions of adults, men and women are trafficked annually and forced into lives of near-bestiality to provide the profits that are the allure for so many slavers and traffickers. The State Department of the United States estimated in 2006 that approximately 600,000 to 800,000 victims are trafficked across the world every year.[8] The State Department also estimated in 2007 that eighty percent of victims are female, with up to fifty percent being minors.[9] The end of the Cold War and ensuing financial disaster for the former states that comprised the Soviet Union, brought slavery and international trafficking into the lives of many nationals of that region. Eastern European women have been trafficked all over the world, mainly into prostitution, and have suffered both physical abuse, exposure to diseases such as AIDS, emotional and psychological trauma, and the mental havoc caused by subjection on a daily basis to violence and degradation.[10] Through the lens of the trafficking and slavery situation, it seems as though millions of people are on the move. Asians, Africans, Latin Americans, East Europeans, all peoples are being caught in the

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5. Barbara Kralis, *Different Forms of Human Slavery*, RENEW AMERICA, July 20, 2006, http://www.renewamerica.us/columns/kralis/060720.

6. Int'l Labour Org. [ILO], *Helping Hands or Shackled Lives? Understanding Child Domestic Labour and Responses to it*, 2004 (*prepared by* June Kane) *noted in* DAVID BATSTONE, NOT FOR SALE: THE RETURN OF THE GLOBAL SLAVE TRADE-AND HOW WE CAN FIGHT IT, 6-7 (HarperCollins, 2007).

7. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Rest. 2200A(XXI), arts. 18(3), 23(1), 24(1), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter International Covenant on Civil and Political Rights]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), arts. 10(1), 11, 13, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc A/6316 (Dec. 16, 1966) [hereinafter International Covenant on Economic, Social and Cultural Rights]; Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 26-27, U.N. GAOR at 71, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

8. HUMAN SMUGGLING AND TRAFFICKING CTR., U.S. STATE DEP'T, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad* 2 (2006), *available at* http://www.gao.gov/new.items/d06825.pdf.

9. Off. to Monitor and Combat Trafficking in Persons, *Trafficking in Persons and International Military Organizations* 1 (2007), U.S. STATE DEP'T, *available at* http://www.state.gov/documents/organization/82447.pdf.

10. *See generally* Francis T. Miko & Grace Park, *Trafficking in Women and Children: The U.S. and International Response*, 6-7, CRS REPORT FOR CONG, U.S. STATE DEP'T, Mar. 18, 2002, *available at* http://fpc.state.gov/documents/organization/9107.pdf (discussing the trafficking of Eastern European Women and the abuse they have suffered).

coils of this particularly evil manifestation of globalization. As the United Nations has explained: "No country is immune from the crime of human trafficking, either as source or destination countries."[11] According to Barbara Kralis, forced labor exploitation exists on every continent except Antarctica.[12]

Although the clandestine nature of the crime and the fear instilled in its victims bedevils attempts at statistical precision, there can be no doubt that the problem is both global and very large.[13] Scholars and legislators come up with varying statistics, but it is important to focus on the massive amount of human suffering implicit in those bare numbers. The divergence in numbers should not hinder us to the urgent necessity for action. Most authorities agree that despite the divergent numbers, it seems apparent that the majority of those trafficked across the world, women and children,[14] face conditions of brutality and bestiality that are almost beyond comprehension. In those states that denigrate the role and significance of women on the basis of tradition or historical cultural systems, women and young girls are particularly at risk.[15] If slavery is a globalized crime that encompasses twenty-seven million people as its victims, it bears frequent repeating that the female ratio has been estimated by the United Nations at nearly eighty percent.[16] The detrimental impact on so many millions of people uprooted from their own countries and forced into alien environments and a brutally degrading life is hard to reconcile with the progress and economic betterment globalization has produced for those lucky enough never to have been enslaved. The slavers and traffickers have utilized all the tools of globalization to accomplish their goals, including ease of communications, particularly cell phones and the internet, and the simplicity of moving money and people.[17] Consequently, the "traffickers' web spans the whole planet."[18]

While this crime exists and involves millions of people, it is a criminal action that is perceived as abhorrent and illegal throughout most of the civilized world.[19] There are several international agreements, conventions, and covenants that outlaw slavery and trafficking and condemn its practice.[20] If a flood of words alone could

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11. U.N. OFF. ON DRUGS & CRIME [UNODC], Annual Report 2008: *Human Trafficking: A Crime That Shames Us All* 5 (2008), *available at* http://www.unodc.org/documents/about-unodc/AR08_WEB.pdf.

12. Barbara Kralis, *21st Century Slavery*, RENEWAMERICA, July 18, 2006, http://www.renewamerica.us/columns/kralis/060718.

13. *Id.*

14. Miko & Park, *supra* note 10, at 4.

15. *Id.* at 5.

16. *Trafficking in Persons and International Military Organizations*, *supra* note 9.

17. *See generally* U.N. INTER-AGENCY PROJECT ON TRAFFICKING IN WOMEN AND CHILDREN IN THE MEKONG SUB-REGION, *Globalization, Migration and Trafficking: Some Thoughts from the South-East Asian Region* (2001) (*prepared by* Phil Marshall), *available at* http://www.un.or.th/TraffickingProject/Publications/globalisation_paper.pdf.

18. U.N. OFF. ON DRUGS AND CRIME [UNODC], *Trafficking in Persons: Global Patterns* 11 (Apr. 2006), http://new.vawnet.org/category/www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf.

19. KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES 17 (Berkeley: Univ. of California Press, 2007).

20. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 7, art. 8;

eradicate this hideous crime, the verbal efforts of the United Nations would have freed every man, woman and child on this planet from bondage. Unfortunately, words alone will not solve this problem. Both the United Nations and its predecessor, the League of Nations framed international agreements against trafficking.[21] Slavery and the slave trade are specifically prohibited in Article 5 of the Universal Declaration of Human Rights.[22] The issue has emerged in various human rights conventions and covenants, which have been accepted and ratified by most of the nations of the world. To mention only some of these instruments, Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (1981)[23] calls for the suppression of all forms of traffic in women; Article 10 of the International Covenant on Economic, Social and Cultural Rights (1976)[24] protects children from economic and social exploitation; Article 8 of the International Covenant on Civil and Political Rights (1976)[25] outlaws slavery, the slave trade, and forced labor.

Most relevant of these agreements is the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.[26] This international agreement supplemented the United Nations Convention Against Transnational Organized Crime, which was adopted by the General Assembly in 2000 and entered into force in 2003.[27] The Protocol is the first "global legally binding instrument with an agreed definition on trafficking in persons."[28] Having articulated the first internationally accepted definition of trafficking, the Protocol required that countries criminalize trafficking in human beings.[29] The Protocol provided for the protection of victims and cooperation among States.[30] The question that springs to mind is, why, in the face of so much globally expressed abhorrence for this crime, the existence of so many international prohibitions on its practice, and the daily evidence of the suffering it causes around the world, is this allowed to persist? Why are the eloquent words not supplemented with firm action to eradicate this terrible evil? What will it ultimately take for the world to realize

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International Covenant on Economic, Social and Cultural Rights, *supra* note 7, art. 5-6; G.A. Res. 217A(III), *supra* note 7, art. 4-5.

21. *See* BATSONE, *supra* note 6, at 179-80.

22. G.A. Res. 217A (III), *supra* note 7, art. 5.

23. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/Res/34/180 (July 17, 1980).

24. International Covenant on Economic, Social and Cultural Rights, *supra* note 7.

25. International Covenant on Civil and Political Rights, *supra* note 7.

26. U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, Annex II, U.N. Doc A/Res/55/25/Annex II (Nov. 15, 2000).

27. *See* U.N. OFF. OF DRUGS & CRIME, *United Nations Convention against Transnational Organized Crime and its Protocols*, http://www.unodc.org/unodc/en/treaties/CTOC/index.html (last visited Oct. 2, 2008).

28. *Id.*

29. U.N INTER-AGENCY NETWORK ON GEN. AND WOMEN EQUALITY, *United Nations Peacekeeping in the Service of Peace: Human Trafficking and United Nations Peacekeeping* 4, DPKO POLICY PAPER (Mar. 2004), http://www.un.org/womenwatch/news/documents/DPKOHuman TraffickingPolicy03-2004.pdf.

30. United Nations Convention Against Transnational Organized Crime and its Protocols, *supra* note 26.

that twenty-seven million men, women, and children cannot simply be ignored as so many disposable people?[31]

According to writer E. Benjamin Skinner, "Annually, traffickers now take more slaves into the United States than seventeenth century slave traders transported to pre-independence America."[32] That the United States of America views the continuation of this crime as a serious matter is proven by the bipartisan attention that has been paid to articulating concern about it. Democratic President Bill Clinton signed the Trafficking Victims Protection Act in 2000.[33] This legislation was reauthorized in 2003 and in 2005.[34] In 2003, Republican President George W. Bush expressed his nation's concern about this global crime when he addressed the General Assembly of the United Nations and informed its members that annually nearly a million human beings are bought, sold, and forced across the borders of the world.[35] President Bush commented in his inaugural address in 2005 that "[n]o one is fit to be a master, and no one deserves to be a slave."[36]

Assuming the international responsibility befitting its superpower status, the United States instituted in this legislation a process for ranking countries and preparing annual reports according to the performance of nations in combating human trafficking.[37] Tier One countries are deemed to have complied with the minimum standards of the Trafficking Victims Protection Act; Tier 2 countries demonstrated, on the basis of U.S. investigation, inadequate compliance but significant efforts in that direction.[38] By contrast, Tier 3 countries are determined to be in a state of non-compliance and lack significant efforts to achieve the standard.[39] Tier 3 countries would, after a period, be subject to sanctions by the United States.[40] David Batstone, reflecting the views of abolitionists and human rights advocates, critiqued the implementation of this promising plan alleging that "geopolitical politics" influenced the report for the year 2002.[41] Batstone found Tier 3 countries are often on hostile terms with the United States, while friendly countries with terrible trafficking records were listed in the top two tiers.[42]

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31. BALES, *supra* note 18, at 8.

32. E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY 265 (Free Press: A Division of Simon 2008).

33. *Id.* at xvi.

34. Jim Finckenauer & Min Liu, *State Law and Human Trafficking* 8-9 (draft presented at *Marshalling Every Resource: State Level Responses to Human Trafficking Conference* 2006), *available at* http://www.princeton.edu/prior/events/conferences/past_events/conference_39.html_1.

35. George W. Bush, President, U.S., Speech to the United Nations General Assembly (Sept. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2008/09/20080923-5.html.

36. George W. Bush, President, U.S., Inaugural Address (Dec. 7, 2005), *available at* http://www.whitehouse.gov/inaugural/.

37. *See e.g.*, U.N. OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *2005 Trafficking in Persons Report*, U.S. DEP'T OF STATE, June 3, 2005, *available at* http://www.state.gov/g/tip/rls/tiprpt/2005.

38. *Id.*

39. *Id.*

40. *Id.*

41. BATSTONE, *supra* note 6, at 193.

42. *Id.* at 192-93.

Unlike the nineteenth century when slavery was a legitimized, even accepted, institution in so many parts of the world, today it is internationally outlawed, globally condemned, and yet it persists. Worse, there are more slaves today than ever in the past, although because of the global population explosion they represent a smaller percentage of the total.[43] According to Batstone, "more slaves are in bondage today than were bartered in four centuries of the transatlantic slave trade."[44] The persistence of slavery despite its global condemnation and illegal status begs the question as to why this hideous form of discrimination cannot be removed when there are ample international instruments and national, state, and provincial laws in many nations that forbid its practice and threaten serious penalties for slavers and traffickers. This article seeks to understand some of the reasons why even though there are such good intentions to eradicate the evil, the problem continues to plague the world. The problem of slavery has caught the attention of governments, political leaders, abolitionists, community activists, journalists, and academics. There is no shortage of excellent suggestions for its speedy eradication. Yet it persists, and in the process twenty-seven million people pay the price for the world's apparent inability to come to grips with this practice.

Because it is illegal, slavery now lurks in hidden corners of the world's economy and spreads its tentacles in secretive areas where people are forced to labor for bare subsistence with little or no possibility of escape. This is the clandestine economy that partially provides us in North America with cheap goods and enables us to indulge in an orgy of consumerism. In the words of Antonio M. Costa, Executive Director of the United Nations Office on Drugs and Crime, "[t]he blood, sweat and tears of trafficking victims are on the hands of consumers all over the world."[45] Because free slave labor is highly profitable for those who are not averse to exploiting their fellow human beings, slavery has spread internationally. The United Nations has estimated the total market value of human trafficking at $32 billion, with $10 billion being made on the sale of individuals and the rest being profits on the victims' labor.[46] The globalized market system brings the products made by slaves into homes all over the world, with a financial return from slavery ranging by one estimate, as high as 800 percent.[47] The United States Government's Department of Health estimated in 2004 that trafficking was the "fastest growing criminal industry in the world," second only to drug dealing[48] in terms of its money-making potential. The irony is that globalization and the expansion of the free market system were supposed to usher in a world of better economic conditions in poor countries, a higher standard of living, and increased

43. SKINNER, *supra* note 31 , at xi.

44. BATSTONE, *supra* note 6, at 6.

45. Press Release, U.N. OFF. OF DRUGS & CRIME, *First Ever Global Forum on Human Trafficking to Launch United Campaign to Fight the Crime*, Feb. 12, 2008 (statement by Executive Director of the U.N. Office on Drugs and Crime, Antonio Maria Costa), http://www.unodc.org/unodc/en/press/releases/2008-02-12.html.

46. U.N. OFF. OF DRUGS & CRIME, *supra* note 11, at 25.

47. BALES, *supra* note 18, at 12.

48. Loring Jones et al., *Globalization and Human Trafficking*, J. OF SOC. & SOC. WELFARE 118 (June 1, 2007).

economic opportunity. That has occurred to some extent. However, the dark side of globalization has been the demand for very cheap goods that can only profitably be made by slave labor. As consumers, all of us bear a responsibility to consider whether or not our purchasing power is being used to provide economic betterment or to further the crime of slavery. Globalization will, in this century, be about individual responsibility for actions taken internationally. While the prospect is daunting, the possibilities for having a salutary impact are challenging and should enthuse, not discourage, those who wish to see the world finally rid itself of this evil practice that has prevailed for thousands of years. The cost in terms of human deprivation, sacrifice and waste alone justify that we now pay attention to the ideas for eradication and commit our energy to this cause. To return to Rousseau, if all of us are really born free, then sixty years after the enactment of the Universal Declaration of Human Rights (1948)[49] and nearly two and half centuries after Rousseau penned those famous words that inspired a revolution in France, it would appear to be timely to bring concrete reality to the ideal that individual freedom is a universal right and has to be universally applicable whether a person is born in the United States of America or in any other part of the world.

II. THE PROBLEM

A. Definitions

As slavery has persisted for thousands of years, one cannot but wonder why there is still so much debate and discussion about the definition of slavery. It is not my intention in this paper to debate the definitional disputes. That task has already been addressed comprehensively and exhaustively. Rather, my task is to explore the consensus on definition and provide an introduction to the causes and scope of the problem.[50] It would be preferable to suggest that implementation of the existing law, not more verbiage about definition, has to be our priority if slavery is to be eradicated in the near future. Universal acknowledgment and realization that this is a "crime that shames us all,"[51] would hopefully galvanize the international community to meaningful action.

Much energy has been expended delineating the precise nexus between slavery and trafficking and the equally particular distinctions between smuggling and trafficking. Trafficking per se is perceived via a lens focusing on its components, servitude, debt bondage, sexual exploitation, and peonage.[52] It is suggested that smuggling, although a crime, does not involve the exploitation of the person smuggled, which trafficking clearly does.[53] In reality, cases of voluntary smuggling can in a second become cases of trafficking when the smuggler refuses to release his passengers and turns them into slaves. For years

49. G.A. Res. 217A (III), *supra* note 7.

50. *See* Kevin Bales, *Defining and Measuring Modern Slavery*, FREETHESLAVES.NET, 2007, *available at* http://216.235.201.228/NETCOMMUNITY/Document.Doc?id=21.

51. U.N. OFF. OF DRUGS & CRIME, *supra* note 44.

52. Finckenauer & Liu, *supra* note 33, at 3.

53. ORGANIZED CRIME: FROM TRAFFICKING TO TERRORISM 388 (Frank G. Shanty & Patit Paban Mishra eds., ABC-CLIO, vol. 1, 2008).

now, academics, lawyers, and legislators have pondered the precise and applicable definition that would meet the requirements of a particular law.[54] While these debates have rambled on, millions of men, women and children have paid the price for the dilatoriness of the world in addressing their plight and acting to stop the annihilation of their hopes for a decent existence. Were we or our children caught in the coils of a slaver, would we be so patient with the ponderings about precise definitions that have taken priority over the urgent and immediate right of all people to be free; to be not merely born free but to live their lives as free individuals?

A significant amount of time has also been spent on the nexus between prostitution and slavery; the debate focusing on whether prostitution is automatically slavery or only when force is involved.[55] It might be timely now to get past the barriers established by this desire to delineate on the basis of our ideological inclinations and proceed instead to implement with vigor the laws that are already in existence along with the universal norms established by the United Nations.

To cut the Gordian knot of definitional disputes and competitive agendas with respect to which aspects of the problem deserve priority, some authors have sought an inclusive methodology for identifying the components that constitute this crime so that laws can be applied and perpetrators can be prosecuted.[56] For instance, the definition prepared by E. Benjamin Skinner is useful; he states that a slave is "someone who is forced to work, through fraud or threat of violence, for no pay beyond subsistence."[57]

With respect to trafficking, United Nations Office on Drugs and Crime (U.N.O.D.C.) has specified that "[t]rafficking involves the forcible movement of persons from one location to another for the purposes of exploitation and for commercial gains. Victims are recruited and transferred either against their will or through deception."[58] With respect to the differentiation between smuggling and trafficking, many writers on this subject agree now that all too frequently individuals, particularly from poor countries, pay handsomely for their facilitated illegal immigration to a rich Western country only to find themselves, once across the border, in the hands of thugs and gangs that hold them for forced labor including prostitution against their will. In such a situation, the distinction between a person who is smuggled and a person who is trafficked dissolves in the brutal reality that he or she (as is often the case) has paid to enter into captivity;

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54. *See* Kevin Bales & Peter T. Robbins, *"No One Shall Be Held in Slavery or Servitude:" A Critical Analysis of International Slavery Agreements and Concepts of Slavery*, HUM. RTS. REV., Jan. 01, 2001.

55. *See* KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY: A READER 62-64 (University of California Press 2005).

56. *See* A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 349-51 (1999).

57. SKINNER, *supra* note 31, at 289.

58. U.N. OFF. ON DRUGS & CRIME, *supra* note 11, at 18.

dreams of a better financial life destroyed for the illicit profits of the smugglers/traffickers. The ultimate challenge lies not in the words that define the facets of this crime but in recognizing its occurrence and in turning the spotlight of world public opinion on the prevalence and proliferation of the problem. As more and more people become aware that the clothes they wear, the food they eat, and the toys their children enjoy come with a possible trail of human tragedy, hopefully the moral conscience of the world will acknowledge the evil of this crime and work actively to eradicate it.

Because of its chameleon-like nature and the necessity to hide itself from the law, slavery can today be disguised, hidden and passed off as adoption (in the case of young children); generosity to poor relatives; compassion to unemployable persons; and work aid projects for destitute peasants.[59] Cruel exploitation can be represented as the most compassionate form of kindness. Hence it is not so much that we cannot define slavery as that it is sometimes hard, particularly for the uninitiated, to recognize and identify situations of slavery when they are encountered.In view of the fact that slavery prevails in virtually every country on this planet, it ought not to be so hard to locate slaves. By training professionals, particularly police officials and social workers, the initial identification of a slave situation could be facilitated. The record thus far is not very promising. With respect to the United States of America, although awareness of crime has definitely increased and there have been prosecutions and convictions, between 2000 and 2006, by one estimate, this nation liberated less than two percent of its slaves.[60]

Kevin Bales, a professor and President of Free the Slaves, one of the leading abolitionist organizations, has suggested that the poorest countries in the world have the highest incidence of slavery while the richest nations also have significant pockets of this crime because nationals of poor countries are trafficked for labor to the rich countries.[61]Explaining that no country is immune from trafficking, the United Nations Office on Drugs and Crime explained in its 2008 Annual Report that "victims from 127 countries undergo exploitation in 135 nations."[62] Professor Bales has also emphasized the tragedy of over one billion people today living on one dollar per day or less; these are the families most vulnerable because their "children are regularly harvested into slavery."[63] By way of contrast, the average cow in North America and Europe is provided a subsidy of two dollars per day.[64]

Although it is useful to delineate, define, and document the problem, it is more important to eradicate the crime and free the victims who have been trapped. U.S. Ambassador to Monitor and Combat Trafficking in Persons, John Miller, concluded that slavery is "one of the great moral struggles of our day."[65]

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59. *See Temporary Slavery Commission Report to the Council*, League of Nations Doc. A.17 1924 VI (1924), *quoted in* Bales & Robbins, *supra* note 53, at 21.

60. SKINNER, *supra* note 31, at 282.

61. BALES, *supra* note 1, at 16.

62. U.N. OFF. ON DRUGS & CRIME, *supra* note 11, at 25.

63. BALES, *supra* note 1, at 15-16.

64. *Id.* at 168.

65. Derek Ellerman, "The John Miller Interview," Polaris Project, February 13, 2003; *cited* DAVID

B. Causes of Slavery

The causes of slavery and all the attendant crimes of kidnapping, torture, rape, murder, mutilation, and forced labor can be linked directly to every negative aspect of the state of today's world. According to Professor Phyllis Coontz and Catherine Griebel, Case Manager for an anti-trafficking program in a non-profit organization, "[c]oncern about trafficking lay dormant throughout most of the Cold War, but interest was rekindled in the late 1980s with the growth of the sex industry, globalization, and the collapse of the Soviet Union."[66] Commenting on the significance of trafficking by the early 1990s, these two authors explain the reasons as related to escalating concerns with "transnational crime, particularly with such activities as money laundering, drug trafficking and the trade of weapons, human organs and people."[67]

The creation of a global market place has brought significant prosperity to many areas of the developing world and there is evidence of a growing middle class in economically booming countries like India and China.[68] However, the wealth has not trickled down sufficiently nor has it touched the rural core of these ancient societies.[69] In Southeast Asia, the problem is compounded by the instability of governments, a growing terrorist threat, and religious conflict.[70] The rapidity of economic change and the onset of global involvements have multiplied the scope of the problem. As David Batstone commented: "Whenever a society faces seismic changes, the powerless suffer most."[71] According to Nobel Peace Prize winner, Muhammad Yunus, the explanation is the global income distribution:

> Ninety-four percent of world income goes to forty percent of the people, while the other sixty percent must live on only six percent of world income. Half of the world lives on two dollars a day or less, while almost a billion people live on less than one dollar a day.[72]

Traditional ways of living have crumbled before the demands of a growing market

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BATSTONE, NOT FOR SALE 4, (New York: HarperOne, 2007).

66. Phyllis Coontz & Catherine Griebel, *International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law*, WOMEN'S HEALTH J., Apr. 2004, at 47, 49.

67. *Id.* at 49-50.

68. Barbara Stark, *When Globalization Hits Home: International Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1561 (2006).

69. *See* J. Wyatt Kendall, *Microfinance in Rural China*, 12 N.C. BANKING INST. 375, 387-88 (2008).

70. *See generally* Mohammad Sadli, *Restoring Investor Confidence in Indonesia*, 12 INST. OF S.E. ASIAN STUD. 3 (2000), *available at* http://www.iseas.edu.sg/trends1220.pdf (explaining that continuing political instability will produce sharp devaluation of Indonesia's currency); Hist. Peace Churches Int'l Conf., "Peace in Our Land": Historic Peace Churches in the Asian Context of Religious Pluralism, Poverty and Injustice (Dec. 2-7, 2007) (unpublished conference handout) (stating that careless religiosity can be fatal for the poor); Press Release, General Assembly, Poverty Reduction, Terrorism, Disarmament, Humanitarian Relief Discussed as General Assembly Continues Review of Secretary-General Report, U.N. Doc. GA/9917 (Sept. 9, 2001) (describing the eradication of terrorism as essential to development and poverty reduction).

71. BATSTONE, *supra* note 6, at 21.

72. MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY 3 (PublicAffairs 2008).

economy where cash rather than crops dominates; where diversified agrarian systems have bent to the necessity for cash crop production; where farmers cannot focus on growing food to feed their families but must grow the one crop that can be sold.[73] Meanwhile, the price for any such cash crops is determined not by the farmers but by speculators in far-away countries who trade in the peasants' labor for greater personal profits.[74] Such peasant farmers in countries in Asia are so beaten by the economic cruelty of the world that encompasses them that they are forced to conclude that the only hope for survival is to send family members – often the youngest and the brightest – to the cities to make some kind of a decent wage and keep the family financially afloat. The rural poor are the most likely to fall victim to the lures put out by slavers and traffickers who appear in villages and "recruit" youngsters for impossibly wonderful "opportunities," preying on the gullibility born of naiveté of the parents, who sometimes out of sheer love send their children, they think, to a better life. These are the targets who wind up as slaves, working long hours making rugs, matches, crushing stone, performing servant chores, in fact any kind of work that yields a profit. They get very little food, rarely any money, and cannot leave for they are trapped not just by the slaver but by their own fears. They are routinely tortured and raped to ensure that terror will hold them in bondage. Hence it is that Asia, moving upward and booming economically in some sectors, also provides, because of searing poverty, a plentiful harvest of people, mainly young people, for the labor and prostitution markets of the world.

In Africa, dictatorship, tribal and ethnic conflict, along with the predatory actions of egomaniacal warlords and their followers, have virtually decimated the traditional structures and agrarian way of life of society in states like Somalia, Sudan, and Zimbabwe.[75] Decades of war, the absence of stable governments, the non-existence of democratic structures in a number of failing or failed African states make any notion of human rights impossible to implement. Africa provides evidence of the abduction of thousands of young children and their brutal conversion into child soldiers, a phenomenon that has raised international concern but still persists.[76] By one estimate, forty thousand children have been turned into child soldiers or sex slaves in just one country, Uganda.[77] Save the Children has estimated that approximately 11,000 children are being held by various groups fighting each other in the Democratic Republic of Congo.[78] This problem of using

73. Peter Straub, *Farmers in the IP Wrench -- How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries*, 29 HASTINGS INT'L & COMP. L. REV. 187, 197-98 (2006).

74. *See generally* Robert F. Blomquist, *Globoecopragmatism: How to Think (and How Not to Think) About Trade and the Environment*, 55 U. KAN. L. REV. 129, 142 (2006) (demonstrating how financial pressure from the I.M.F. and World Bank forces farmers to intensify cash crop production).

75. For insight into the impact of cash crop economies in the West African production of cocoa, *see* Humphrey Hawksley, *Child Cocoa Workers Still 'Exploited'*, BBC NEWS, Apr. 2, 2007, http://news.bbc.co.uk/2/low/africa/6517695.stm.

76. *See generally* BALES, *supra* note 1, at 159-60 (explaining efforts by U.N. peacekeepers to curb violence in countries that have seen increasing slavery of child soldiers).

77. BATSTONE, *supra note* 6, at 18.

78. HumanTrafficking.com, A Report by Save the Children Reveals Millions of Children Live as

children to fight is not confined to Africa. According to UNICEF, more than 300,000 children under the age of eighteen are being utilized in over thirty armed conflicts in various parts of the world.[79] Some of these children are just seven years old.[80]

Africa's rich mineral wealth has bred more misery as the famous gold and diamond mines are sometimes manned by forced labor, the gems being utilized to purchase weapons to continue the nightmare of tribal conflict and warfare.[81] In the case of jewelry particularly in the developing world, from the mines to the stone cutters and polishers, to the gold setters to the wholesale and retail vendors the gem can travel through many slave hands before gracing the ring finger of a well-off purchaser.[82] Efforts have been made internationally to curtail the trading of "conflict diamonds."[83] Slavery in the gem industry has not been adequately addressed .

Poverty and structural breakdown of the pillars of society can also account for the vast numbers of slaves that have been trafficked from Eastern Europe to markets all over the world. Massive unemployment resulted from the political and social breakdown of the governmental systems that had dominated Eastern Europe for much of the twentieth century.[84] The power vacuum was filled by criminal gangs who networked very rapidly across the globe and preyed on their own people for a pool of labor that provided huge profits for very little investment. By one estimate, the ranks of the poor in Eastern Europe climbed from 14 million in 1989 to 147 million in 1999. [85] Traditional society virtually imploded in those states that made up the former Yugoslavia, as ethnic cleansing and war became part and parcel of everyday life. Russia became the Wild Wild East as the twentieth century wound down and a new millennium emerged, trailing a host of problems, including massive corruption, rampant crime, poverty, hunger, and war. The fall of communism should have heralded a new era of democracy and individual rights and freedom. Instead. it brought a Darwinian social environment where the most corrupt and criminal triumphed and those who were unable to ride the wave to success became victims and its slaves. The International Organization for Migration estimated that between approximately 1991 and 2004, about a quarter of a million women were trafficked from Eastern to Western Europe.[86]

Child Slaves, http://www.humantrafficking.org/updates/707 (last visited Sept. 16, 2008).

79. U.S. DEP'T OF STATE, *Trafficking in Persons Report* 21 (2008), *available at* http://www.state.gov/documents/organization/105501.pdf [hereinafter Dep't of State 2008 Trafficking in Persons Report].

80. Barbara Kralis, *Combatant Human Slaves*, RENEWAMERICA, July 25, 2006, http://www.renewamerica.us/columns/kralis/060725 (last visited Sept. 16, 2008).

81. *See generally* BALES, *supra* note 1, at 159 (describing how various forms of slavery, including gold and diamond mining, are used to fund warlords).

82. *Id.* at 181.

83. *See Id.* at 170.

84. BATSTONE, *supra* note 6, at 170.

85. SKINNER, *supra* note 31, at 134.

86. *See generally* INT'L ORG. FOR MIGRATION [IOM], *Changing Patterns and Trends of Trafficking in Persons* (2004), *available at*

Latin America, having endured decades of guerrilla wars, terrorist attacks, dictatorship, and deprivation, particularly for the aboriginal people, also experienced economic poverty on a massive scale. The United Nations has estimated that in that region the "richest one tenth of the population earn 50 per cent of income, the poorest tenth earning 1.6 per cent."[87] The evidence was seen daily in the numbers rushing to the borders of the United States of America, where they hoped to make a decent living. Those illegal migrants frequently wound up as trafficked persons and, once in the United States, disappeared into a murky world of hidden and clandestine slavery where exploitation and cruelty accompanied by rape, torture, and back-breaking labor became their only knowledge of the Land of the Free and the Home of the Brave.

It is indeed true that "[s]lavery feeds on poverty, insecurity and ignorance."[88] Were the problems of poverty, hunger, economic deprivation and landlessness as well as rural indebtedness alleviated, even in some measure, the human well spring which is now exploited for the profits of criminals could be the source for on-site development and rural reinvigoration. The irony is that while human beings survived long before industrialization and machinery dominated the world, no civilization can sustain itself without food, which comes from its agrarian base. By depleting the rural base of so many countries and by denigrating its significance, we are virtually dooming the sustainable future of the entire planet.

According to the United Nations trafficking "takes many different forms. It is dynamic and adaptable and, like many other forms of criminal activity, it is constantly changing in order to defeat efforts by law enforcement to prevent it."[89] Traffickers today are vigilant, flexible, and able to move slaves from one location to another to prevent any groups from attempting to free them. Only surprise raids on known slave locations can enable abolitionists to rescue these victims.

A related challenge is evident in the nexus between human trafficking and human smuggling, both distinct crimes, but as the United Nations admits, "they represent overlapping crime problems."[90] One distinction between smuggling and trafficking that has been emphasized is the fact that "smuggling is always transnational in nature, but trafficking may or may not be."[91] The problem lies not just in catching the criminals but in prosecuting them and convicting them particularly when aspects of their crimes are transnational, their targets are multi-national and their ill-gotten gains are secreted in tax haven shelters. The legal challenges are obvious but when the human cost is factored in as a priority, the

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http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/changing_patterns.pdf, *noted in* BATSTONE, *supra* note 6, at 172.

87. U.N. OFF. ON DRUGS & CRIME, *Alternative Development: A Global Thematic Evaluation*, at v, U.N. Sales No. E.05.XI.13 (2005), *available at* http://www.unodc.org/pdf/Alternative_Development_Evaluation_Dec-05.pdf.

88. BALES, *supra* note 1, at 59.

89. U.N. OFF. ON DRUGS & CRIME, *Toolkit to Combat Trafficking in Persons*, at ix, U.N. Sales No. E.06.V.11 (2006), *available at* http://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf.

90. *Id.* at xiv.

91. *Id.*

nations of the world have to overcome these obstacles and ensure that their governments are focused on the freeing of slaves and the eradication of all aspects of this criminal activity. Admittedly, law enforcement is consistently playing catch-up with criminals who form part of elaborate international networks.[92] Such criminals now have the means to shuffle victims freely across borders that sometimes become porous when corruption eases the transportation routes.[93]

C. Scope of Slavery

The scope of slavery and trafficking encompasses the entire globe. The United Nations Office on Drugs & Crime estimated in 2006 that trafficking affected human beings from 127 countries and they were exploited in 137 countries.[94] To consider the situation only in the United States, the abolitionist organization Free the Slaves determined from its research that between 1998 and 2003, trafficking victims brought to the U.S.A. came from thirty-five countries with the majority of slaves being found in states such as California, Florida, Texas, and New York.[95] The research team from Free the Slaves and the Human Rights Center at the University of California, Berkeley, concluded on the issue of the scope of slavery, that forced labor prevailed in five sectors of the American economy: prostitution and sex services (46%), domestic service (27%), agriculture (10%), sweatshop factory work (5 percent), and restaurant/hotel work (4%).[96]

Although some advocates of the abolition of slavery focus on the illicit sex trade, indentured bondage is a far more prevalent manifestation of trafficking.[97] This is particularly true in countries like India, Pakistan, Bangladesh, and Nepal, where it is estimated that there are at least fifteen million bonded slaves[98] working in fields, mines, and quarries, brought to dire straits by loans, sometimes of less than one dollar, a sum sufficient to tie a family to indenture for generations.

The gruesome reality is that, although definitions vary and statistics are sometimes intelligent estimates, slavery has been recognized as existing in a huge variety of agricultural, craft, and industrial enterprises around the world. As attorney Elissa Steglich commented: "Trafficking is an equal opportunity crime affecting a diverse pool that includes all nationalities and education levels."[99] Slaves produce and harvest basic foods such as rice, coffee, cocoa, sugar, beef, fish, vegetables, and fruit; apparel basics such as cotton; building requirements like

92. *Id.* at xx.

93. *Id.* at 179.

94. UNODC, *supra* note 17, at 17.

95. Free the Slaves & Human Rights Ctr., *Hidden Slaves: Forced Labor in the United States*, at 7 (2004), CORNELL UNIV. ILR SCHOOL, *available at* http://digitalcommons. ilr.cornell.edu/forcedlabor/8/, *quoted in* BATSTONE, supra note 6, at 227-28.

96. *Id.*

97. *See generally* Off. to Monitor and Combat Trafficking in Persons, *How Can I Recognize Trafficking Victims?*, U.S. STATE DEP'T., July 28, 2004, http://www.state.gov/g/tip/rls/fs/34563.htm.

98. BALES, *supra* note 1, at 9, *quoted in* BATSTONE, *supra* note 6, at 11.

99. Elissa Steglich, Address at Princeton University's Woodrow Wilson School Conference: Defining Trafficking Concepts from the States (Dec. 1, 2006), *available at* http://uc.princeton.edu/main/index.php?option=com_content&task=view&id=1341.

timber and brick; metals including iron, steel, gold, and tin; gemstones like diamonds; and crafts such as jewelry making.[100] Slaves have been discovered making sporting goods, clothing, rope, rugs and carpets, shoes, and fireworks.[101] As Bales explains: "Slavery in the product chains of the food we eat, the clothes we wear, and the cars we drive is an ugly blot on our lives."[102] Although the proportion of such items produced by free labor as opposed to slave labor varies depending on the country, the region, economic necessity, and a host of other variables, the infiltration of slave-made goods into the product chain for so many commodities that are in regular use throughout the world makes the task of identifying and uprooting the illicit producer, who uses slaves, from the ranks of the genuine producers who pay regular wages a real challenge in every society.

David Batstone lists various areas where the victims of slavery can be found working at cleaning homes and landscaping and gardening. They can be found at construction sites, casinos, hotels, strip clubs, massage parlors, and brothels.[103] "Hidden in plain sight,"[104] slaves can be found at a significant variety of employment locations including even modeling studios, bars, escort services, and adult bookstores.[105]

Assessing the scope of the crisis of slavery, researchers have discovered that this crime is prevalent in certain sports as well, specifically camel racing in the Persian Gulf States.[106] The U.S. State Department has found that annually, children as young as two years are trafficked from countries like Sudan, Pakistan, and Bangladesh for use as camel jockeys for the entertainment of camel racing fans in the Gulf States.[107] These children are "often sexually and physically abused; most are physically and mentally stunted, as they are deliberately starved to prevent weight gain."[108] These young children are often seriously injured, stampeded to death by camels, and live as isolated prisoners without family contact in camps surrounded by barbed wire.[109] They are said to number in the thousands.[110]

The scope of human trafficking has been manifested in the global spread of sexually transmitted diseases and the higher incidence of HIV among victims.[111]

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100. BALES, *supra* note 1, at 181.

101. *Id.*

102. *Id.* at 201.

103. BATSTONE, *supra* note 6, at 265.

104. BALES, *supra* note 1, at 133.

105. Off. to Monitor and Combat Trafficking in Persons, *supra* note 96.

106. Off. to Monitor and Combat Trafficking in Persons, *The Facts About Children Trafficked for Use as Camel Jockeys*, U.S. STATE DEP'T., Aug. 8, 2005, http://www.state.gov/documents/organization/51161.pdf.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*.

111. Jay C. Silverman et al., *HIV Prevalance and Predictors of Infection in Sex-Trafficked Nepalese Girls and Women*, 298 THE J. OF THE AM. MED. ASS'N, 536, 540 (Aug. 1, 2007), *noted in* U.S. STATE DEP'T., OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, *Health Consequences*

Children are particularly vulnerable. Referring to medical research, the State Department explained, "HIV prevalence among women trafficked from Nepal and prostituted in India is 38%. The rate of HIV infection exceeded 60% among girls prostituted prior to 15 years of age."[112]

The globalization of slavery today is evident from the conclusion of the U.S. State Department that "traffickers are seizing upon any targets of opportunity for exploitation and relying on vast distances and cultural and linguistic differences to increase the vulnerability of victims."[113] Hence, Zambian girls were trafficked to Ireland for sexual exploitation; Filipina women were trafficked to Cote d'Ivoire for the same purpose; Vietnamese children were trafficked to the United Kingdom for work in drug smuggling; Thai men were trafficked to the U.S.A. for labor work; Dominican women were trafficked to Montenegro for sexual exploitation as similarly were Chinese women sent to Afghanistan; and Russian students were trafficked to the U.S.A. forcibly to sell ice cream.[114] Clearly, the "slave trade is driven by the dynamics of supply and demand."[115] Antonio Costa, head of the United Nations Office on Drugs and Crime, explained the dynamic:

> Like any other market – and it is a perverse kind of market – there is a supply in terms of people who are duped, coerced, or tricked, and a demand, in terms of people who may be buying the sort of commodities we are talking about. And there is the act of connecting the supply and demand – those who do the trafficking.[116]

III. THE SOLUTION

A. Eradicating Slavery: The Challenge Ahead

Transnational crimes require international intervention. The globalized world has grasped the reality that when markets internationalize and travel restrictions ease, crime and victimization can spread across the world. Human trafficking will require firm and determined global measures to bring about its eventual eradication. The United Nations has admitted that "human trafficking is a crime of such magnitude and atrocity that it cannot be dealt with successfully by any Government alone."[117] There is no shortage of suggested remedies, a plethora of legal instruments exist, both international and national, and there are plenty of very pertinent and relevant suggestions that abolitionists, lawyers, politicians, and social workers have made to alleviate the worst excesses of this widespread crime and assist in its permanent eradication. If the United Nations and its sovereign state members will commit funding and resources with a determined will to work together to eradicate slavery, much could be achieved. The ideas exist; what is

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of Trafficking in Persons, Aug. 8, 2007, http://www.state.gov/documents/organization/91537.pdf.

112. *Id.*

113. Dep't of State 2008 Trafficking in Persons Report, *supra* note 78, at 7.

114. *Id.* at 7.

115. BATSTONE, *supra* note 6, at 9.

116. Stephanie Holmes, *Trafficking: A Very Modern Slavery*, B.B.C. NEWS, Feb. 15, 2008, *available at* http://www.bbb.co.uk.2/hi/europe/7243612.stm.

117. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 17, at 26.

needed is the will to implement those ideas and to pursue slavers and traffickers and rid the world of this terrible crime. The international effort is grounded in the provisions of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which entered into force on December 25, 2003.[118] The global measures focus on three principles: prevention, prosecution, and protection.[119]

The initial step is to acknowledge across the world that this crime extends beyond national boundaries and requires international intervention. Because it takes advantage of the facilities available in an increasingly globalized world, slavery has to be confronted and challenged both within and outside the bounds of national sovereignty. The United Nations admitted the challenge involved: "Trafficking is frequently a crime of an international nature, crossing national borders and jurisdictions. Law enforcement efforts can often be confounded by the need to conduct investigations or pursue criminals across international borders."[120]

The twentieth century has seen the scope of international intervention expand considerably in terms of protecting populations at risk, for example, in cases of genocide and ethnic cleansing. One possibility would be to expand this international cooperation that has sent United Nations peacekeepers to the far corners of the world and extend this mandate to policing against slavery and protecting populations at risk of being trafficked. The existence of disciplined, dedicated international forces in failing states could be a usual preventive measure in terms of protecting civilians against slavery. Where genocide is occurring, or even ethnic cleansing or war, there is always a greater risk of slavery and trafficking being utilized by one side against the civilians of an opposing group. Kevin Bales has suggested the creation of a United Nations force with a specific anti-slavery mandate.[121] Equally interesting is Bales' proposal for United Nations slavery inspectors, much like the weapons inspectors[122] who went to Iraq.

The greater challenge, in view of the continuing, frequently insistent emphasis of governments on the supremacy of national sovereignty, is to find an international solution within states that are not failing or suffering from civil war but nevertheless are negligent about the prevalence of slavery and trafficking. Greater awareness and the growth of an articulate public opinion about the evils of slavery and a refusal to accept its existence in any country might serve to jog negligent governments into dealing with this problem. The new abolitionists are both articulate and very eloquent in highlighting the impact of this crime and in galvanizing public opinion.[123]

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118. U.N. OFF. ON DRUGS AND CRIME, *Signatories to the CTOC Trafficking Protocol*, U.N.Doc. A/55/383 (Dec. 25, 2003).

119. Loring Jones et al., *supra* note 47.

120. U.N. OFF. ON DRUGS AND CRIME, *supra* note 17, at xx.

121. BALES, *supra* note 1, at 162.

122. *Id.* at 25.

123. *See generally* BALES, *supra* note 18 (highlighting ways in which abolitionists have raised awareness of slavery).

According to the United States State Department, "[b]ecause trafficking in persons is usually an 'underground' crime, it can be difficult for law-enforcement personnel, the public, or service providers to readily identify a trafficking victim and/or a trafficking scenario."[124] Within states, there is a clear need to educate police, social workers, community activists, and any one else who wishes to get involved to the need to identify and recognize signs of this clandestine crime; to work to ensure that the law enables perpetrators to be prosecuted and convicted; and that governments are not ambivalent about the need to eradicate slavery within their borders. Although many states have a tolerable legal framework to address the issue, the implementation of the law is perceived as difficult if not impossible. This occurs because the crime is often unreported; slaves are too terrified to testify against their exploiters for fear that their families may be targeted for reprisal and, in the case of children and women who have been tortured, too traumatized to cope with the stress of enduring a judicial procedure.[125] Having been kept in virtual isolation, slaves are often unfamiliar with either the language or the customs of the country to which they have been trafficked. They are terrified of the unknown and fear authority figures like policemen. They have learned the brutal way not to trust anyone and are unlikely to reveal much until those barriers are broken down. There is also the ancillary problem whereby freed slaves can themselves face prosecution, either as illegal immigrants or as criminals where they have been forced to work as prostitutes.[126] Often the victims have no identification papers as their exploiters all too often take their documents away. These legal anomalies whereby victims are criminalized by the law are being redressed in some countries.[127]

The United Nations has suggested that member states establish domestic laws that would criminalize any involvement with trafficking, with appropriate penalties for perpetrators, protection for victims, including medical assistance, and the opportunity of voluntary return to their home countries.[128] Additionally, the United Nations recommended the implementation of training programs for officials involved in the prevention, prosecution, and protection aspects of the slavery problem.[129] These excellent suggestions, if implemented internationally, could seriously erode the arrogant defiance of the law, a hallmark of slavers and traffickers.

The American experience demonstrates the significant impact of increased awareness about the problem and systematic training of law enforcement at every level including judges. Within the United States, the Federal Department of Justice reported that it had increased prosecutions since 2001, obtaining thirty-six convictions on human trafficking in 2007 and ninety-eight convictions in 2006.

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124. Off. to Monitor and Combat Trafficking in Persons, *How Can I Recognize Trafficking Victims?*, U. S. STATE DEP'T., July 28, 2004, http://www.state.gov/g/tip/rls/fs/34563.htm.

125. U.N. OFF. ON DRUGS AND CRIME, *supra* note 17, at xxi.

126. *Id.* at 126.

127. *Id.* at 128.

128. *Id.* at 12.

129. *Id.*

The same report also specified that between 2001 and 2006, the Civil Rights Division and U.S. Attorneys' Offices had prosecuted 360 defendants, secured 238 convictions and guilty pleas and opened 639 new investigations.[130] These figures were considerably higher than for the previous six years.[131] Although these efforts are worthwhile, their impact has to be weighed against the fact that there are an estimated 50,000 slaves in the United States of America.[132]

If these efforts against traffickers succeed, an ancillary but significant impact could be a salutary and useful detriment to organized crime in America. The nexus between slave trafficking and organized crime is evident in many nations of the world. Trafficking assists in the growth of organized crime and this "criminal activity has increased social costs, undermined and corrupted governments, broken down social systems, and damaged public health."[133]

The vast profits to be made from trafficking have generated an emphasis on the importance of running parallel financial investigations with respect to exposing the perpetrators and the extent of their profits. The United Nations deems such financial investigations critical and emphasizes the golden rule: "Follow the money and you will find the trafficker."[134] This type of financial investigation can only be conducted on a transnational basis, given the ease with which traffickers can whisk their money electronically around the globe. Seizing the assets of those who have profited from trafficking and compensating the victims from those assets ought to become standard practice. A number of abolitionists have suggested that conviction must be accompanied by financial restitution for the freed slaves.[135]

B. The United Nations Protocol

On November 15, 2000, after two years of intensive negotiation,[136] the United Nations General Assembly passed Resolution 55/25 adopting the United Nations Convention against Transnational Crime.[137] This Convention included supplemental agreements titled the Protocol to Prevent, Suppress, and Punish trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea, and Air.[138] A third Protocol dealt with the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.[139] The Protocol against trafficking in persons entered into force on December 25, 2003.[140] While, because of space limitations, it is not my

130. U.S. DEP'T. OF JUSTICE, Fact *Sheet: Civil Rights Division Efforts to Combat Modern-Day Slavery* (Jan. 31, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/January/07_crt_061.html.

131. *Id.*

132. SKINNER, *supra* note 31, at 265.

133. Sharon Anne Melzer, *International Trafficking of Men, Women, and Children in* 1 ORGANIZED CRIME (Frank G. Shanty & Patit P. Mishra eds., ABC-CLIO, Inc., 2008).

134. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 17 at 76.

135. *Id.* at 52.

136. Finckenauer and Liu, *supra* note 33 at 6.

137. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 17 at 2.

138. G.A. Res. 55/25, Annex II-III, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter *Convention against Transnational Organized Crime*].

139. G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (May 31, 2001).

140. U.N. OFF. ON DRUGS AND CRIME, Protocol to Prevent, Suppress and Punish Trafficking in

intention here to analyze in great detail the significance and impact of the Protocol, it is important to emphasize that this document reflects a global realization that the world needs a "comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights."[141] Referred to as the Palermo Protocol because it was signed in that Italian city in 2000, this international instrument explains its purpose as being to prevent and combat trafficking in persons, particularly women and children; to protect and assist the victims; and to promote cooperation among States to fulfill these objectives.[142]

The United Nations tackled the problem of defining this crime with a broad and comprehensive approach. Although somewhat wordy, the definition seeks to cover many of the possible methods by which slavery becomes a brutal reality for so many millions of people. The U.N. definition states:

> 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[143]

The Protocol also specifies, in relation to the above definition, that the victim's consent is irrelevant. Children under 18 years are provided broad protections from trafficking.[144] A conviction that the epidemic of "human trafficking is a crime against humanity,"[145] impelled the member states to adopt the Protocol and commit to adopting domestic legislation to implement its provisions.[146] The United Nations confined the specific application of the Protocol to offences that were "transnational in nature," and to those that involved an "organized criminal group."[147] The United Nations defined this latter factor as "a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences

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Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE &tabid=2&id=375&chapter=18&lang=en (last visited Sept. 18, 2008).

141. Convention against Transnational Organized Crime, *supra* note 137, at Annex II Preamble.

142. Convention against Transnational Organized Crime, *supra* note 137, at Annex II art. 2.

143. *Id.* art. 3(a).

144. *Id.* art. 3(d).

145. U.N. OFF. ON DRUGS AND CRIME, *Annual Report 200*, at 18, www.unodc.org/documents/about-unodc/AR06_fullreport.pdf (last visited Sept. 19, 2008) [hereinafter *Annual Report 2007*].

146. Convention against Transnational Organized Crime, *supra* note 137, at Annex I art. 5.

147. *Id.* art. 4.

established in accordance with the Convention, in order to obtain, directly, or indirectly, a financial or other material benefit."[148]

In setting up a number of specific tasks for States parties to undertake, the United Nations in this Protocol formulated the creation of a nation-by-nation structure of law and policies that might someday eradicate slavery, provided nations are willing to commit funding and demonstrate a will to implement the directives.[149] Besides formulating appropriate legislation to prevent trafficking, prosecute perpetrators, and protect slaves, the Protocol also asks States to conduct research and mass media campaigns along with social and economic initiatives to combat this crime.[150] The involvement of non-governmental organizations is mentioned and there is a call to tackle problems such as poverty and underdevelopment, which lead to trafficking.[151] Additionally there are provisions asking States' officials in law enforcement and immigration to exchange information; to spot possible perpetrators and victims as they cross borders.[152] Making various officials aware of and sensitive to the slavery issue has also been stressed in this Protocol.[153] Additionally, the Protocol required States parties to provide legally relevant information to victims and it opened the possibility of compensation for victims.[154]

The Protocol obtained 117 signatures and 111 ratifications by the end of 2006,[155] reflecting a global dedication, at least in theory, to its principles. The reality, however, is far different as the "custodian" of the Convention,[156] the United Nations Office on Drugs and Crime, admitted in its 2007 Annual Report: "Translating the Protocol into reality remains problematic. Very few criminals are convicted and most victims are probably never identified or assisted."[157] The Protocol has also been criticized for not representing an international consensus with respect to its wordy definition, which has been considered "too conceptually comprehensive to be effectively understood."[158] Despite these critiques, it is important to remember that the purpose of the international instrument is to "establish minimum standards. States parties are bound to adhere to this threshold

148. U.N. OFFICE ON DRUGS AND CRIME, *Trafficking in Persons Global Patterns*, at 6, www.unodc.org/pdf/traffickinginpersons_report_2006-04.pdf (last visited Sept. 19, 2008) [hereinafter *Global Patterns 2006*].

149. Convention against Transnational Organized Crime, *supra* note 137, at Annex II.

150. *Id.* art. 9(2).

151. *Id.* art. 9(3).

152. *Id.* art. 10(1)(a).

153. *Id.* art. 10(2).

154. U.N. OFF. ON DRUGS AND CRIME, *Toolkit to Combat Trafficking in Persons*, at 163, www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf (last visited Sept. 20, 2008) [hereinafter Toolkit].

155. Annual Report 2007, *supra* note 144, at 18.

156. Global Patterns 2006, *supra* note 147, at 68.

157. Annual Report 2007, *supra* note 144, at 19.

158. Phyllis Coontz & Catherine Greibel, *International Approach to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law* (Feb. 12, 2008), http://www.awid.org/eng/Issues-and-Analysis/Library/International-Approaches-to-Human-Trafficking-The-Call-for-a-Gender-Sensitive-Perspective-in-International-Law.

but may still adopt stricter measures."[159] The United Nations Office on Drugs and Crime has assisted a number of countries such as Armenia, Lebanon, and South Africa to draft appropriate anti-human trafficking laws and has additionally trained officials from Nigeria, Ghana, Togo, and Ukraine and other nations in this field of law enforcement.[160] Victim referral services have been established with United Nations expertise in the Czech Republic, the Philippines, Poland, Moldova, and the Slovak Republic.[161]

The United Nations Office on Drugs and Crime in 2007 established a Global Initiative to Fight Human Trafficking (UN.GIFT), described as "an innovative programme whose ultimate mission is nothing less than the eradication of human trafficking."[162] To fulfill this mandate UN.GIFT has dedicated itself to raising international awareness, assisting states to draft legislation, writing training manuals for law enforcement personnel and judges, and standardizing systems for collection of data and its analysis[163] There has been a considerable amount of recent activity under the aegis of the United Nations Office on Drugs and Crime toward these aims. In 2007, this widespread activity included a conference in Uganda to train peacekeepers to detect and prevent trafficking; a meeting in Brazil to develop national plans; an event in Thailand to discuss criminal justice options; an innovative event in South Africa entitled "Interfaith dialogue: what the religious community can do to combat human trafficking;" a conference in India to consider trafficking and sexual exploitation; a prevention-oriented conference in Lithuania; and a workshop in Egypt to consider legislative options.[164] Time alone will determine whether all these efforts will substantially reduce, if not eradicate, the problem of trafficking. Former Secretary-General of the United Nations, Kofi Annan, pleaded for effective action in an address before the British Houses of Parliament: "Let us take action to prevent any more victims from having their dreams of a better future turn into nightmares of exploitation and servitude."[165] Despite its international activities the United Nations drew criticism with respect to its handling of the problem of slavery. As Bales explained: "The U.N. is trying hard, but in ways that are hamstrung by national governments, stymied by bureaucrats in its own ranks, and scattered and disorganized across a range of its own agencies."[166] Bales concluded that "the United Nations suffers terribly from the distance between dream and reality."[167] While the governments and law enforcement agencies train and prepare themselves to do battle with trafficking and slavery, the slaves around the world continue their lives of unremitting toil and degrading humiliation. Men, women, and children who are no longer owners of

159. Toolkit, *supra* note 153, at 2.

160. Annual Report 2007, *supra* note 144, at 22.

161. *Id.* at 21.

162. U.N. Office on Drugs and Crime, *Annual Report 2008*, at 25, www.unodc.org/documents/about-unodc AR08_WEB.pdf (last visited Sept. 20, 2008).

163. *Id.* at 26-27.

164. *Id.* at 27, 28, 48.

165. *Id.* at 25.

166. BALES, *supra* note 1, at 140.

167. *Id.*

their own bodies, are used and abused until their brutal existence on this planet has ended in the only escape they have: death. There are no acceptable global statistics on the number of slaves who escape and who can lead somewhat normal lives after their ordeal. The reality is that percentage is miniscule. Time alone will tell whether the flurry of bureaucratic and legislative activity on a global scale has a significant or negligible impact on the number of slaves and on the crime of trafficking. While it is beneficial to have the international agreements, unless there is a universal will to implement their provisions, this activity and the lofty speeches denouncing the evils of slavery will be meaningless and of little consequence: full of sound and fury, signifying nothing.[168]

C. Some Additional Suggestions to Deal With the Problem

According to Baroness Caroline Cox and Dr. John Marks, if "slavery is to be abolished in the twenty-first century. We need first to break the bonds of ignorance, silence, interest, ideology, complacency, and complicity."[169] While implementing the ideas of the United Nations Protocol on Trafficking would constitute a very significant step for all nations of the world, there are numerous other ways in which governments, legislators, and law enforcement personnel along with academics, media representatives, members of non-governmental organizations, and community activists - indeed each citizen can play a vital role in utilizing varied expertise to alleviate some aspects of this vast problem on a daily basis. Many authors who have been horrified by the plight of slaves have provided plenty of useful and helpful ideas. It would be worthwhile to examine some of these suggestions because they are pragmatic and practical. All that is required is a sense of dedication to implementation and a commitment to utilize one's energy toward helping to free those in bondage around the world. Although ultimate eradication may well take a massive international campaign, this particular cause can also be assisted by each of us as citizens of the world and of our nations. Because the products of slavery are so pervasive in our society, we are bound by intangible threads to those who work under such brutal conditions to provide us with our consumer comforts. We are in a position as citizens of free societies, as consumers, ultimately as members of an increasingly globalized market economy, to have an impact however small on this problem.

One fundamental methodology is to raise awareness and to write and publish materials about this criminal practice.[170] Slavery is so clandestine and so low on the scale of media priorities that it often remains hidden and slavers prefer to live unobtrusively, shielding the reality of the dark side of their lives from even their closest friends. Bales has commented that "slavery can be hard to see if you are not used to looking for it."[171] The increasing level of public awareness can only result in an enhanced capacity for people to recognize, identify, and point the finger at perpetrators. Bringing this terrible evil out from hiding is one way that

168. *Id.* at 139-42.

169. COX & MARKS, *supra* note 3, at 155.

170. BALES, *supra* note 1, at 235-36.

171. *Id.* at 225.

every person who constitutes that wonderful force we call world public opinion can play an active role in this cause. Slavers and traffickers do not want to face the glare of publicity. They definitely do not want to be named or publicly exposed. Media managers have to be convinced to bring this issue to the forefront of their information dissemination agenda so that populations, especially in the free world, will be galvanized to look for slavery and, when they identify it, to go to the authorities. Many writers have suggested the importance of initiating discussions on this subject through our schools and universities, our community groups, even our neighborhoods. According to Barbara Kralis, "[t]he greatest weapon against human trafficking and slavery is inquisitive neighbors."[172] By increasing public awareness, particularly in the democratic countries, it will be possible to hold governments accountable for the measures they have taken to eradicate slavery. At one time, a few short decades ago, environmentalism was hardly on the public radar. The work of environmental activists, the convening of international conferences like the Rio Earth Summit in 1992,[173] and the heightened global interest and awareness have now made environmentalism mainstream in our thinking. Indeed those who oppose environmentalism are the anachronistic elements, demonstrating how far public opinion has traveled in a short time span. With that much effort placed on slavery and slave trafficking and with greater awareness globally, this terrible evil already outlawed in much of the planet and certainly in international fora, could be eradicated.

Because slave-made goods are mixed-in with legitimate products, it is impossible for the average consumer to determine whether or not slavery has tainted any product he is consuming. Nowhere is the need for precise information more important than in this realm of awareness raising. Given enough incentive and consumer prodding, the large multinational corporations could conduct extensive investigations to ensure that no slavery has entered their product lines. These ideas have floated for years but successful implementation on a significant scale has still not occurred. Louisa Waugh suggests in her book, Selling Olga, that if "retailers were held legally responsible for the workers who produce the goods they sell, this would make a vital difference."[174] The Bureau of International Labor Affairs of the United States Department of Labor has committed to preparing and publicizing a list of goods believed to be produced by forced labor and child labor.[175] The State Department announced at the commencement of 2008 that a globally oriented list of such products is slated for publication by 2009.[176]

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172. Barbara Kralis, *Catholic Church Fights Human Trafficking & Slavery*, RENEWAMERICA, Aug. 4, 2006, http://www.renewamerica.us/columns/kralis/060804.

173. *See* RANEE K.L. PANJABI, THE EARTH SUMMIT AT RIO: POLITICS., ECONOMICS, AND THE ENVIRONMENT, 25-27 (Northeastern University Press 1997).

174. LOUISA WAUGH, SELLING OLGA: STORIES OF HUMAN TRAFFICKING AND RESISTANCE xvi (Phoenix 2006).

175. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, tit. I, §105(b), 119 Stat. 3558 (2006).

176. Off. to Monitor and Combat Trafficking in Persons, *U.S. Government Efforts to Fight Demand Fueling Human Trafficking*, U.S. DEP'T OF STATE, Jan. 7, 2008,

The secrecy surrounding actual cases of slavery has bedeviled attempts at statistical measurement of the problem. Increasing awareness, particularly on a public scale of its existence, will undoubtedly bring more and more cases to light and, eventually, this may enable statisticians to deal with definitive figures and statistics on the extent of the crime. The importance of basing research on clear statistical data is obvious. However, we have to remember that the priority is to free the slaves as fast as possible. Where so many human lives are at stake, we cannot afford the luxury of insisting first on counting the victims and focusing so much on studying the problem that we neglect actively dealing with it. That said, it is important to note the remarks of researchers who formulated a paper on the quantification issue for the February 2008 Vienna Forum to Fight Human Trafficking.[177] These researchers suggested that in "the absence of systematic and reliable statistical time series, we do not even know with any degree of precision if the number of reported trafficking cases is increasing or decreasing and why this might be so."[178] Baroness Caroline Cox and Dr. John Marks put this issue in appropriate perspective when they pointed out that "behind each statistic is a human being – a man, woman or child; and behind each human being is a family and a community, which have been devastated or destroyed by the horror of slavery in our world today."[179] The secrecy enables slavery to continue and persist. Emphasizing this aspect of the problem, Terry Coonan, Executive Director of the Center for the Advancement of Human Rights at Florida State University, commented that "[w]e need to crack this code of silence."[180] Public awareness, greater involvement, active discussion and sharing of information all form part of the methodology by which the veil of secrecy will eventually be lifted.

It is important as well for us in North America and Europe to insist that our governments provide resources to increase awareness about this terrible crime in the countries of origin, which are in the developing world. It is imperative that the message gets out to the villages and small towns of Asia, Africa, Latin America, and Eastern Europe so that parents, aware of the threat, will not so easily be gulled into handing over their children to slavers posing as compassionate philanthropists. The people of rural areas have to be warned about the potential danger and alerted to the tactics and wiles utilized by traffickers to lure victims into this terrible situation. Women in particular have to be enlightened about the dangers of trusting people to smuggle them across borders, under the illusion that a new life of freedom and economic betterment awaits them. Traffickers are initially con artists and heightened awareness has to be raised in those areas most vulnerable to their lures. It is also important that the message be conveyed in a manner that is clear and coherent and believable by people, the majority of whom cannot read and

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http://www.state.gov/g/tip/rls/fs/08/100208.htm.

177. The Vienna Forum to Fight Human Trafficking 13-15 Feb. 2008, Austria Center Vienna Background Paper, *024 Workshop: Quantifying Human Trafficking, Its Impact and the Responses to It*, U.N. GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING, UN.GIFT B.P.: 024 (2008).

178. *Id.* at 2.

179. COX & MARKS, *supra* note 3, at 15.

180. *Report: Modern-Day Slavery Alive and Well in Florida*, CNN, Feb. 25, 2004, http://www.cnn.com/2004/US/South/02/25/human.trafficking.ap/.

most of who have an ingrained distrust of authority figures like policemen and government bureaucrats. Those of us whose entire working day is meshed with the technology of modern communications have to understand and appreciate that the internet, radio, newspapers, and television may not have penetrated to the remote areas where traffickers seek out victims for their hideous trade. We will need 'low tech' methodologies to reach and convince some of these remote villages. One possibility might be to utilize the services of local residents who have suffered the ordeal and been freed to raise the awareness of their own family, relatives, and neighbors. This system has apparently worked in countries like India and should be widely utilized. Schools and religious institutions in developing countries could be urged to provide information to children about the threat of abduction and kidnapping and about the necessity to be alert to the perils. Bales has suggested that an anti-slavery lens be the methodology for perceiving many other realms of political and economic activity, particularly with respect to development assistance programs.[181] As he stated: "If the World Bank reviews each of its grants and loans through an antislavery lens, it will ensure that no projects would increase a local population's vulnerability to slavery."[182] Similar levels of heightened awareness of the need to eradicate slavery incorporated into the daily programs and deliberations of the World Trade Organization would bring the matter to the forefront of the global economic agenda.[183]

Similarly, most authors have emphasized, as has the United Nations, the need for extensive training for law enforcement personnel.[184] The United States Government has mandated anti-trafficking training for all of its service members including civilians working for the Department of Defense.[185] The United States Departments of Labor and Homeland Security and other governmental agencies are involved in various plans that target human trafficking.[186]

Space constraints prevent detailed discussion and analysis of the multiplicity of ideas that abolitionists have provided for implementation by all sectors of society, working together to eradicate slavery. The existence of so many suggestions, proposals and plans makes the route ahead easier because the paths have already been charted.[187] The range of ideas is extensive; from prevention programs to deter traffickers to awareness projects that can slave-proof entire rural communities; from legislative action to prohibit these crimes, to law enforcement action to prosecute and convict perpetrators; from rehabilitation proposals to curtail the horror of poverty and hunger, to elaborate funding and development schemes to revitalize economies; from protection and the provision of shelter for rescued and freed slaves, to fulfillment of their dream of a new life with adequate

181. BALES, *supra* note 1, at 237-41.

182. *Id.* at 166.

183. *See Id.* at 171-75.

184. *See* Finckenauer & Liu, *supra* note 33, at 13.

185. Off. to Monitor and Combat Trafficking in Persons, *supra* note 9.

186. Off. to Monitor and Combat Trafficking in Persons, *Facts About Human Trafficking*, U.S. DEP'T OF STATE, Dec. 7, 2005, http://www.state.gov/g/tip/rls/fs/2005/60840.htm.

187. *See generally* BALES, *supra* note 1.

financial and educational resources and finally, to reunification of families torn apart by the horrors of this vicious crime.

The irony is that the eradication of slavery is almost a motherhood issue, arousing no opposition to its agenda and no detractors. Eradication commands extensive support, both internationally and within many nations and yet slavery persists and may, with the market demands of globalization, even be increasing. Its prevalence makes a mockery of the altruistic efforts of those who seek to eradicate this crime. What this indicates is that human trafficking requires greater effort, more dedication and more active participation on a global level to bring about its destruction. If the proliferation of slavery has been one tragic consequence of globalization, perhaps in its eradication via international efforts mankind can find some redemption for the suffering of millions of men, women, and children who have been the innocent victims of this crime. Pope Benedict XVI has referred to trafficking in human beings as a "scourge;" appropriate terminology, echoing the horror of his predecessor, Pope John Paul II, who called this trade "a shocking offense against human dignity and grave violation of fundamental human rights."[188]

IV. CONCLUSION

Today, "[h]uman trafficking and slavery flourish in the form of sex slavery, domestic servitude, forced debt bondage, involuntary servitude, combatant slaves, child sex tourism, child sports slaves, contract slavery, and cheap child labor."[189] The eradication of all these crimes will take enormous dedication and commitment. As John R. Miller, United States Ambassador tasked to deal with this problem, said, "[a]ll of us must be committed to the new abolition movement of ending human trafficking."[190]

Antonio M. Costa, Executive Director of the United Nations Office on Drugs and Crime, eloquently summarized the challenge ahead when he said,

> We have to decrease the number of victims by preventing trafficking, we have to increase the number of victims who are rescued and supported and we have to increase the number of traffickers who are convicted. We have the tools to do this, but we do not have the political will, large-scale public awareness or the resources to make it happen.[191]

This article has sought to explore aspects of the problem and to discuss some of the many suggestions and proposals for its elimination. Whether or not all of us are up to the challenge that lies ahead; whether we will find the will and the energy to confront the criminals and convict them; whether we can return the millions to freedom and assure them of justice; whether this new millennium will be lauded for its liberty or derided for its indifference to human misery, remain to be seen.

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188. Kralis, *supra* note 171.

189. Barbara Kralis, *Human Trafficking: A Trans-National Criminal Enterprise*, RENEWAMERICA, July 28, 2006, http://www.renewamerica.us/columns/kralis/060728.

190. Barbara Kralis, *Exposure of Evil Makes Way for the Good*, RENEWAMERICA, Aug. 8, 2006, http://www.renewamerica.us/columns/kralis/060808.

191. Annual Report 2008, *supra* note 11, at 25.

Ambassador John R. Miller has warned that the "struggle will be a long one."[192] However if in the future we succeed in this great venture, which is certainly not beyond the scope of our planet, then the words of Rousseau might quite appropriately and aptly be misquoted in context: "People are born free and are finally, nowhere in chains."

192. John R. Miller, Dir. of the Office to Monitor and Combat Trafficking in Persons, Remarks at the Underground Railroad Freedom Ctr. Dedication (Aug. 23, 2004) (transcript available at http://www.state.gov/g/tip/rls/rm/43617.htm).

SHARED BUT DIFFERENTIATED RESPONSIBILITY: INTEGRATION OF INTERNATIONAL OBLIGATIONS IN FIGHT AGAINST TRAFFICKING IN HUMAN BEINGS

ANNA GEKHT*

I. INTRODUCTION

Trafficking in persons is a serious violation of fundamental, predominant and non-derogable human rights and freedoms. It is deeply rooted within the very heart of international world order and invokes not only moral, but also legal, economic, social and political implications.

Although the states have acknowledged the graveness of the consequences of trafficking, government complacency, corruption and lack of political will resulted in unchecked escalation of trafficking in human beings. The connection of trafficking and prostitution, together with strict state immigration policies have stalled international legal and political counter-trafficking efforts. The widespread nature of human trafficking, violations of fundamental principles of international law and human rights it implies, and evident fragmentation and lack of effectiveness and enforcement capacity of current laws, suggest a need for reform.

The process of trafficking consists of three distinct phases, interconnected but not entirely dependent on each other: (i) the actual act of trafficking; (ii) the subsequent phase of exploitation that the act of trafficking is committed for; and (iii) post-trafficking rehabilitation.[1] The execution of the act of trafficking is independent of the realization of its intended purpose[2] and implies the notion of criminal intent as its main characteristic. The structure of the trafficking chains involves (a) agents in the home state of the victims, (b) the transit states which host the victims on their way to final destination, and (c) the states receiving the victims of traffic. The three distinct components of the chain involve a multiplicity of different countries and thus evoke different aspects of human rights, criminal, immigration, labor and public international law, and imply different international obligations and responsibilities of the states involved.

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1. With the third stage only indirectly related to the topic of this paper, the focus of the paper is predominantly on the act of trafficking as such and its consequences, without dwelling into a detailed analysis of specific implications of each of the exploitative purposes for which trafficking is conducted.

2. A person is considered trafficked despite the work of the law-enforcement authorities which may 'rescue' the victim at the very beginning of the trafficking journey envisioned for him or her. The victim is subjected to the initial coercion or deception, regardless of whether these techniques succeed at placing the person within the 'trafficking industry.'

Being an international malady, trafficking cannot be solved by independent domestic responses. This essay will argue that in order for the anti-trafficking policies to become successful they must combine and integrate the various obligations of the involved countries into a single non-fragmented framework built on the foundations of the norms of international human rights law. Within this framework, the states of origin, transit and receiving end of the trafficking chain must assume their part of the shared responsibility for ensuring the protection of the vital social, political and economic rights of the victims, as means for preventing the trafficking in human beings and addressing its consequences; while realizing their obligations of international criminal, immigration and refugee law, ensuring deterrence, prevention and adequate remedies for the victims.

This essay will summarize some of the most pertinent norms and obligations of international human rights relevant for human trafficking. It will analyze the obligations and responsibilities of states deriving from these norms, general principles of international law and specific legal provisions addressing human trafficking directly. On the basis of these normative summaries and implications, it will propose a model of differentiated state responsibility based on a mainstreamed and simplified system of legal human rights commitments integrated within other domains of international law, namely that of criminal and refugee law. By doing so, it will create and discuss in detail a two-fold anti-trafficking model of state responsibility, which will include the responsibility for the act of trafficking; as well as the responsibility for the subsequent exploitation arising out of such 'act'. Among the purposes of trafficking addressed here, prostitution and forced labor aspects will be covered in more detail in this essay.

II. IN SEARCH FOR A DEFINITION

Human trafficking is a complex phenomenon that involves various social, political, cultural and legal aspects. It touches upon some of the most sensitive and rudimentary elements of international order, such as the notions of morality and sovereignty, and spreads across the entire globe. In order to provide in-depth analysis of the legal connotations of trafficking, we shall first discuss the scope and magnitude of the phenomenon; analyze some of the main elements, root-causes of the recent escalation and linkages of human trafficking with violations of human rights; and study the definitions of human trafficking contained in various instruments of international law.

A. The Scope of the Problem

The International Labor Organization (ILO) estimates there are 12.3 million people in forced labor, bonded labor, forced child labor, and sexual servitude at any given time.[3] The US Department of State approximates that 600,000-800,000 people are annually trafficked across national borders, which does not include millions trafficked within their own countries.[4] Trafficking is the third most

3. PATRICK BELSER ET AL., INT'L LABOUR ORG.,. ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 8, (Int'l Labour Office 2005), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081913.pdf.

4. *Id.* at 35.

lucrative illicit business in the world after arms and drug trafficking and is a major source of organized crime revenue.[5] The initial sale of trafficked persons generates an estimated US$ 7 to $12 billion annually, with subsequent sales generating additional US$ 32 billion a year.[6]

"The nationalities of trafficked people are as diverse as the world's cultures."[7] South-East Asia and South Asia are home to the largest numbers of internationally trafficked persons, with 225,000 and 150,000 persons trafficked respectively.[8] About 100,000 persons are trafficked from the former Soviet Union, 75,000 from Eastern Europe, 100,000 from Latin America and the Caribbean and 50,000 from Africa each year.[9] In Asia the largest numbers of women are trafficked within one or between multiple regions. In South Asia and Middle East, child trafficking for domestic exploitation is of particular concern.[10]

Approximately 80 percent of transnational victims are women and girls and up to 50 percent are minors.[11] The majority of cross-border victims are females trafficked into commercial sexual exploitation, with the greater part of persons trafficked within their countries being used for forced and bonded labor.[12] Usually persons who fall into the hands of traffickers desire to leave their countries, seeking to improve their lives through low-skilled jobs in more prosperous states.[13] Child trafficking mostly relies on kidnapped minors or children given by their families to relatives in hope for education and earning opportunities, who in turn sell them into exploitation.[14]

In many cases the exploitation of victims of traffic is progressive: a person trafficked into one form of labor may be further exploited in another. The victims are often beaten and sexually abused, suffer from forced substance abuse, sexually transmitted diseases and HIV/AIDS, food deprivation, psychological torture, which often lead to death.

Despite the common misconception, trafficking is as much of a local and regional phenomenon, as it is an international one. A person may decide to travel within or outside his or her own country for a job, and subsequently fall into involuntary servitude. Trafficking also implies placement of the victim in an unfamiliar milieu where he or she is culturally, linguistically or physically isolated and denied legal identity or access to justice. Such dislocation increases the

5. UNITED NATIONS POPULATION FUND, STATE OF WORLD POPULATION REPORT 44 (2006), *available at* http://www.unfpa.org/upload/lib_pub_file/650_filename_sowp06-en.pdf [hereninafter UNFPA].

6. *Id.*

7. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (June 2006), *available at* http://www.state.gov/documents/organization/66086.pdf [hereinafter TIP REPORT].

8. UNFPA, *supra* note 5, at 45.

9. *Id.*

10. *Id.*

11. TIP REPORT, *supra* note 7.

12. *Id.*

13. *Id.* at 8-10.

14. *Id.* at 10.

marginalization and, therefore, the risk of abuse, violence, exploitation, domination or discrimination both by traffickers and by state officials represented by the police, the courts, immigration officials, etc.

Trafficking chain starts with the recruiter or the person facilitating migration and ends with the last person who buys or receives the victim and holds him or her in conditions of slavery or slavery-like practices, forced labor or servitude. Despite the fact that the victims of trafficking are often the victims of crime, they are often perceived and treated as criminals in countries of destination.[15]

B. Trafficking—The Dark 'Underside' of Globalization[16]

Historically, human trafficking has been directly affiliated with prostitution. Consequently, given the ambiguous moral implications of prostitution, the issue of trafficking remained absent from the international political arena for centuries. The moral aspects evoked by this connection were perceived as internal sovereign matter of each state and have traditionally remained within their margin of appreciation.[17] Ironically, the earliest international response to human trafficking grew out of the 1900s movement against growing numbers of women trafficked into prostitution.[18] It specifically focused on the trafficking of white women and girls for the purpose of prostitution or sexual exploitation, reflected by the terms 'white slave traffic' and "the procuring of women or girls for immoral purposes abroad."[19] Consent became the formative factor for determining the trafficking status of white-skinned prostitutes.[20]

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15. *Id.* at 36.

16. The Director-General, Int'l Labour Conference, Geneva, Switz., 89th Sess., Int'l Labour Org. [ILO], *Stopping Forced Labour: A Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work,*, at 47, Report I (B) (2001).

17. The legalization of prostitution, abortion, euthanasia, and same sex marriages and adoptions remain within the 'margin of appreciation' of the sovereign states. *See* Vo v. France, App. No. 53924/00, 2004-VIII Eur. Ct. H.R. 84; Pretty v. United Kingdom, 41 Eur. Ct. H.R. 155 (2002); R.H. v. Norway, Decision on Admissibility, App. No. 17004/90, 73 Eur. Comm'n H.R. Dec. & Rep. 155 (1992); Boso v. Italy, Decision on Admissibility, 7 Eur. Ct. H.R. 451 (2002).; Paton v. United Kingdom, App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1981) (Commission report); Case C-268/99, Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie, 2001 E.C.R. I-08615 (illustrating the differences between nations regarding the judicial treatment of issues evoking strong moral reactions).

18. *See* International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 1 L.N.T.S. 83 [hereinafter Agreement]; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, *as amended by* Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23 [hereinafter Convention]; International Labour Organization Convention Concerning Forced or Compulsory Labour, June 28, 1930, ILO No. 29, 39 U.N.T.S. 55 [hereinafter Forced Labour].

19. Agreement, *supra* note 18, art. 1.

20. Recently the European Court of Human Rights ruled on the issue of consent in prostitution, and subsequent characterization of prostitution as a means of employment in *Aldona Malgorzata Jany v Staatssecretaris van Justitie*. Case C-268/99, Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie, 2001 E.C.R. I-08615 (2001).

In response to the ineffectiveness of consent-based policies, the international community was forced to gradually agree that consent was an irrelevant parameter in determining and punishing the crime of trafficking.[21] Instead, it was the element of coercion, deception or use of force that set trafficking apart from other forms of persons' smuggling and illegal migration. The resolution of the consent debate had an additional outcome. The authorities dealing with trafficking came to realize that by focusing on trafficking for prostitution and sexual exploitation they failed to address trafficking of women and girls as well as men and boys for other purposes such as bonded/forced labour, child soldiers, domestic work or organ donations. Such widened understanding of the concept of human trafficking has in turn expanded the application of the instruments of international human rights law.

The recent rise in the scope of international trafficking is attributable to a number of political, social and economic factors. Globalization of the world markets, demand for cheap workers, growing global economic gaps, lack of opportunities for development, discrimination and violence against women and children, corruption and organized crime, political instability and armed conflict, growing deprivation and marginalization of the poor, extreme poverty, governmental complacency, discrimination, communication technologies and transport advancements; have all contributed to a recent increase in sales of people.

Political and economic global changes brought about by the end of Cold War and opening of international borders in Asia, resulted in the creation of a massive highly mobile migrant workforce.[22] In the absence of employment opportunities, growing poverty and discrimination in the newly independent and developing countries, the possibility to earn a decent living abroad has lured many into illegal migration and trafficking. While the numbers of those looking for opportunities to immigrate for work rose exponentially, the immigration policies of the developed states have been becoming increasingly restrictive.[23] "Trafficking economies–which arise out of a combination of supply, demand and illegality–are less likely to develop in situations in which opportunities for legal migrant work exist."[24] By limiting the possibilities of legal entry, national authorities of these states have not

21. *See generally* D. Scharie Tavcer, Causal Factors in the Crime of Trafficking of Women for the Purpose of Sexual Exploitation: An Exploration into Push and Pull Factors Relevant to Women Trafficked from Moldova to Western Europe, at 57-63 (November 2006) (unpublished doctoral dissertation, Mount Royal College) (on file with author), http://www.freidok.unifreiburg.de/volltexte/4426/pdf/Tavcer_Doktorarbeit.pdf.

22. Paul J. Smith, *Military Responses to the Global Migration Crisis: A Glimpse of Things to Come*, 23 FLETCHER F. WORLD AFF. 77, 78-79 (Fall 1999). The ILO estimates the population of migrant laborers to be 120 million. Saudi Arabia (7.5 million), the United Arab Emirates (2.3 million), Malaysia (2.3 million) and Kuwait (1.3 million) lead the markets in demand for foreign migrant workers. The Philippines (7 million), Indonesia (3 million), Bangladesh (3 million), and Sri Lanka (1.5 million) are the leading suppliers of these workers. TIP REPORT, *supra* note 7, at 7.

23. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, ¶ 61, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) [hereinafter ECOSOC Report].

24. *Id.* at 22.

discouraged would-be migrants, and have forced many to look for alternative, often illegal ways that lead them to traffickers.[25]

In the global market of trafficking, victims occupy the supply side, whereas the abusive employers and sex buyers represent the demand. Sex tourism and child pornography have become worldwide industries, facilitated by the Internet. Although consumers of forced labor products are ignorant of their involvement with slavery, their existence in high numbers increases the demand for sex workers. Consequently, the demand for cheap illegal labor and prostitution is the primary "pull" factor for the unchecked escalation of human trafficking.

Anti-immigration policies also fuel trafficking. Statistics demonstrate that inflexible policies of exclusion, enforced through severe penal punishments and deportation for their breach, feed directly into the hands of traffickers.[26] Strict anti-immigration policies reduce opportunities for legal migration, encourage migrants to turn to third parties for assistance, and "serve to provide an ever-growing number of clients to the increasing number of underground networks of immigrant smugglers." [27]

C. Legal Definition

A clear, usable legal consensus definition accepted by all actors in the international community is a key first step to drafting and implementing successful anti-trafficking policies. The first of such legally binding definition emerged in 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Protocol), supplementary to the United Nations Convention against Organized Crime (UNCOC).[28] The definition discussed in more detail in subsequent chapters reads:

> (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the *threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power* or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person *having control over another person, for the purpose of exploitation.* Exploitation shall include, at a minimum, the exploitation of the *prostitution* of others or other forms of *sexual exploitation, forced labor* or services, *slavery or practices similar to slavery, servitude or the removal of organs*;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

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25. *Id.*

26. *Id.* at 21.

27. *Id.* at 22.

28. Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 3, G.A. Res. 55/25, at 53, U.N. Doc. A/55/383, A/Res/55/25/Annex II (Nov. 15, 2000) [hereinafter Prevent Trafficking].

> (c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.[29]

Additionally, as noted by the Special Rapporteur on Violence against Women ,the separation of the victims with their own community must be included as the defining factor of trafficking.[30]

The definition contained in the Protocol creates an important legal threshold. It specifically distinguishes the differences between trafficking, illegal migration and migrant smuggling as contained in the variety of acts involved in traffic (recruitment, transportation, transfer, harboring, purchase, sale, receipt of person), actors (chain of individuals or criminal enterprise in various countries constituting the import, transit and export states), means (threat, attempt or use of force, violence or other forms of coercion, abduction, fraud, deception, abuse of power, etc), intended exploitative purposes (forced labor or services, debt bondage, slavery or slavery-like conditions, sexual exploitation, servitude, etc) in unfamiliar and foreign to the victims' location.[31]

It is, however, important to note that since any apparent, implied, or express consent is mitigated by the use of deception, coercion, or other forms of violence, the matter of victim's consent is an element of evidence, not of definition. A person who hires a "smuggler" or travels for a job promised by a "recruiter" is unaware that the "smuggler" or "recruiter" intends to hold or place him or her in forced labor, servitude or slavery-like conditions.[32] In accordance with the above definitions, it is the element of criminal intent, *mens rea,* to coerce a person into

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29. *Id.* at annex II, art. 3(a) (emphasis added). According to the Victims of Trafficking and Violence Protection Act of 2000, Sex trafficking is "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sexual act." "Involuntary servitude includes a condition of servitude induced by means of (a) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (b) the abuse or threatened abuse of the legal process." "*Debt bondage* means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined." "Coercion means (a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or, (c) the abuse or threatened abuse of the legal process." Victims of Trafficking and Violence Protection Act of 2000, § 103, Oct. 28, 2000, 114 Stat. 1464 [hereinafter Victims] (codified as 22 U.S.S. 7101) (emphasis added).

30. "Recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons: (i) by threat or use of violence, abduction, force, fraud, deception or coercion including abuse of authority, or debt bondage, for the purpose of; (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i)." ECOSOC Report, *supra* note 23, at ¶ 4.

31. Prevent Trafficking, *supra* note 28.

32. OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, TRAFFICKING IN HUMAN BEINGS (2007), http://www.legislationline.org/?tid=178&jid=1&less=false.

forced labour, not the actual execution of the intent, that is decisive in determining the crime of trafficking.[33] It is, the extreme degree of coercion with intent for potential lifetime servitude to an 'owner' who exercises dominion over all aspects of a person's life will be regarded as defining elements of the process of trafficking in this paper.

III. LEGAL INSTRUMENTS AGAINST TRAFFICKING IN HUMAN BEINGS

Coercion, use of force or deception with intent to broker human beings via inter or intra-national transport into exploitative or servile conditions in unfamiliar and foreign to the victims' locations are key steps of human trafficking pattern.[34] Each of these steps entails serious violations of fundamental human rights and freedoms, such as (a) the right not to be held in slavery or servitude; (b) the right to liberty and security of person; (c) the right to be free from torture, cruel or inhumane treatment; (d) freedom of movement; (e) freedom from discrimination; and (f) the right to life.

International law imposes positive and negative obligations on all the states to recognize, prevent, ensure, and protect these rights within their territory and jurisdiction. Consequently, the crime of human trafficking evokes a number of such obligations inscribed in the fundamental international and regional human rights instruments described in this Chapter in more detail.

A. International Human Rights Instruments Against Trafficking

1. Prohibition of Trafficking as a Form of Slavery

Article 1(1) of the 1926 Slavery Convention defines slavery as: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised...."[35] In accordance with this definition, slavery entails a life-long permanent ownership over another human being, who is consequently deprived of the right to liberty and property. While not meeting all of the criteria of classic slavery, human trafficking is strikingly similar to it in its allusion to ownership accompanied by extreme physical and psychological coercion.

The core elements of the act of trafficking, as described in the internationally accepted definition, is the application of deception, coercion, or use of force for the purpose of exploitation of the victim often involving severe physical and psychological abuse.[36] The use of deception, coercion, or use of force places the victim under absolute control of his or her traffickers or owners and deprives him or her of fundamental rights and freedoms for the entire period of retention in servitude and thus constitute the condition of slavery. In the context of trafficking,

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33.ECOSOC Report, *supra* note 23, ¶¶ 12-14, 16.

34.*Id.* ¶¶ 13, 15.

35.Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 art. 1(1), 60 L.N.T.S. 253; *See also* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 7 [hereinafter Supplementary Convention].

36. *See* OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, HOW CAN I RECOGNIZE TRAFFICKING VICTIMS? (2004), *available at* http://www.state.gov/g/tip/rls/fs/34563.htm.

exploitation of a person subsequent to the act of enslavement often results in full, albeit non-permanent, ownership, equivalent to slavery.[37]

Article 8 of The International Covenant of Civil and Political Rights (ICCPR) provides that no one shall be held in slavery, servitude, or be required to perform forced or compulsory labor, and awards the prohibition of slavery a non-derogable character.[38] Article 4 of the European Convention on Human Rights similarly establishes an absolute non-derogable prohibition of slavery, forced and compulsory labor.[39] In 1948, the Universal Declaration of Human Rights proclaimed that "no one shall be held in slavery or servitude...."[40] However, more than half a century after the complete abolition of slavery by the Universal Declaration of Human Rights,[41] the problems of slavery and slave-labor have expanded and evolved beyond their historical characterizations into the phenomenon of human trafficking.

The debt bondage form of trafficking defined as the condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited, is specifically outlawed in Article 1 of the Supplementary Convention to the Slavery Convention. [42] The Supplementary Convention also contains explicit prohibitions of other forms of human trafficking, such as forced marriages, transfer of women "for value received or otherwise," and delivery of a child "to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour." [43] The International Labor Organization Convention Concerning Forced or Compulsory Labor also prohibits the use of all forms of forced or compulsory labor that trafficked persons similarly to slaves are forced to perform. [44]

2. Trafficking as a Form of Torture, Inhuman or Degrading Treatment

The type of treatment that victims of trafficking are exposed to undoubtedly constitutes torture, inhuman and degrading treatment. The 1984 Convention against Torture (CAT) proclaimed that any act of torture or other cruel, inhuman or

37. *See* LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV 227, 237 (2003).

38. International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171 [hereinafter ICCPR]; view confirmed by the International Court of Justice in Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 33-34 (Feb. 5) (Second Phase Judgment).

39. Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, 213 U.N.T.S. 221 (also known as the European Convention on Human Rights) [hereinafter Protection].

40. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 4, U.N. Doc. A/810 (Dec. 10, 1948).

41. *Id.*

42. Supplementary Convention, *supra* note 35, art. 1.

43. *Id.*

44. Forced Labour, *supra* note 18, art. 2..

degrading treatment or punishment is an offense to human dignity that should be condemned as the violation of the main principles of human rights.[45] ICCPR and European Human Rights Convention also confirm that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[46] Under international law, states under any circumstances may not tolerate torture or similar practices or derogate from their duty to prevent and punish torture and inhuman treatment.[47]

Involuntary engagement in forced sexual acts evident in prostitution of trafficked women has been numerously acknowledged as such.[48] Rape and extreme physical maltreatment conducted by persons in position of authority such as traffickers or 'owners' has been explicitly recognized by the jurisprudence and Statutes of international tribunals as a form of torture.[49] Although cases in which trafficking is recognized as inhuman or degrading treatment are still rare, the European Court of Human Rights has ruled on a few of them, thereby substantiating the linkage between these violations and human trafficking.[50]

3. Trafficking and Discrimination

As noted above, discrimination on various grounds contributes to the proliferation of trafficking both as its root-cause and consequence. The discriminatory policies and practices of governments help to create a climate in which human rights violations are officially tolerated, if not encouraged, or in some cases perpetrated by the state actors.[51] The principles of equality before the law, equal protection before the law and non-discrimination are at the foundations of the legal structure of national and international public order. "Discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable."[52]

4. Trafficking as Women's and Children's Rights Issue

Since sexual exploitation of women and girls is one of the main purposes of trafficking, it is undoubtedly a women's rights issue. As mentioned earlier, discrimination against women in the source countries is one of the main root-causes of trafficking. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) condemns such discrimination in all

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45. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1974, U.N. Doc. A/39/46, 1465 U.N.T.S. 85 [hereinafter Torture]..

46. ICCPR, *supra* note 38, art. 7; Protection, *supra* note 39, art. 3.

47. ICCPR, *supra* note 38, art. 4(2).

48. *See, e.g.*, Aydin v. Turkey, App. No. 23178/94, 25 Eur. H.R. Rep. 251 (1997).

49. *See id.*; *see also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶¶ 4,8,10 (Sept. 2, 1998).

50. Cyprus v. Turkey, App. Nos. 6780/74 & 6950/75, 4 Eur. H.R. Rep. 482, 493, 536-7 (1976).

51. ECOSOC Report, *supra* note 23, ¶ 4.

52. Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. C.H.R. Advisory Op., OC-18/03, ¶ 101 (Sept. 17, 2003), *available at* http://www.cidh.org/migrantes/seriea_18_ing.doc.

forms and obliges the States Parties to ensure its complete elimination.[53] According to the Convention, the States Parties are required to take all appropriate measures to achieve the elimination of prejudice and stereotyped roles for men and women, thereby ensuring the full development and advancement of women.[54] Furthermore, CEDAW explicitly requires States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[55] Article 6(1) of the American Convention on Human Rights (ACHR) and Article 14 of the European Convention also contain provisions specific to discrimination of women,[56] while the rights of trafficked children are explicitly addressed by the Inter-American Convention on International Traffic in Minors (1994)[57] and the Convention on the Rights of the Child (CRC).[58]

The Convention on the Rights of the Child (CRC) provides that children shall be given opportunities and facilities for healthy and adequate physical, mental, moral, spiritual, and social development with special consideration given to the children living in exceptionally difficult conditions.[59] With respect to trafficking, the CRC explicitly provides that: "States Parties shall take measures to combat the illicit transfer and non-return of children abroad[,]"[60] as well as protect the children from all forms of sexual exploitation and abuse,[61] abduction, sale, or traffic for any purpose or of any form.[62] Moreover, it requires states to "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse,"[63] economic exploitation and performance of work harmful to child's health or "physical, mental, spiritual, moral or social development,"[64] all of which are inherent results of trafficking.[65] International Covenant on Economic, Social and Cultural Rights

53. Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, U.N. Doc. A/34/180, 1249 U.N.T.S. 13 [hereinafter CEDAW].

54. Bertrand G. Ramcharan, *A Victims' Perspective on the International Human Rights Treaty Regime, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND 30 (Yael Danieli et al. eds., Baywood Publishing Company 1999).

55. CEDAW, *supra* note 53, art. 6.

56. Organization of American States, American Convention on Human Rights art. 6(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Protection, *supra* note 39, art. 14.

57. Organization of American States, Inter-American Convention on International Traffic in Minors art. 1, Mar. 18, 1994, O.A.S.T.S. No. 79, 33 I.L.M. 721.

58. Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/49, 1577 U.N.T.S. 3 [hereinafter CRC].

59. *Id.* art. 3.

60. *Id.* art. 11.

61. *Id.* art. 34.

62. *Id.* art. 35.

63. *Id.* art. 19(1).

64. *Id.* art. 32(1).

65. Article 24 of ICCPR and Article 10 of ICESCR require adequate measures of protection from economic and social exploitation of each child in his status of a minor. Article 10(3) of ICESCR explicitly requires that special measures of protection and assistance be taken on behalf of all children and young persons to protect them from economic and social exploitation; employment that may be harmful to their morals or health or dangerous to life or likely to hamper their normal development.

also contains a specific provision on protection of children from economic and social exploitation.[66]

Trafficking also violates two other absolute prohibitions set by the CRC: (a) torture, inhuman or degrading treatment or punishment; and (b) unlawful or arbitrary deprivation of liberty.[67] Should a child become a victim of exploitation, abuse, torture, or any other form of cruel, inhuman or degrading treatment or punishment, such as trafficking, the states (not only their state of nationality, but also the state within the jurisdiction of which the child is found) are under an obligation to take all appropriate measures to promote physical and psychological recovery and social reintegration.[68]

B. International Trafficking – Specific Conventions

A number of important regional and international documents specifically addressing trafficking in human beings set a plethora of international norms and obligations. Among these, were the early 20th century Convention against White Slave Traffic, 1951 Trafficking Convention, followed by 2003 UN Convention against Organized Crime and its Protocol on Trafficking, as well as Special Protocol on the Sale of Children of the CRC. The transnational treaties and agreements are supplemented by numerous regional ones, such as Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002) adopted by the member-States of South Asian Association for Regional Cooperation (SAARC).[69] ECOWAS Action Plan and African Charter of Human and Peoples' Rights[70] also contain important provisions aimed at eliminating trafficking in human beings in the region. For the purpose of this paper, however, we shall focus on the specific policies and programs implemented through international agreements as well as some of the European legislative bodies and agencies.[71]

1. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and Preceding Agreements.

The international trend to address the crime of trafficking in persons goes back to 18 May 1904 when the governments of a handful of states came together to conclude the International Agreement for the Suppression of the White Slave

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ICCPR, *supra* note 38, art. 24; International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, U.N. Doc. A/6316, 993 U.N.T.S. 3 [hereinafter ICESCR].

66. ICESCR, *supra* note 65, art. 10(3)..

67. CRC, *supra* note 58, art. 37.

68. *Id.* art 39.

69. South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan 5, 2002, *available at* http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking___Prostitution.pdf (adopted by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka).

70. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.

71. The analysis of European action against trafficking will not include all regional and state specific programs and policies (the Commonwealth of Independent States and Eastern European initiatives will not be highlighted); instead, the analysis will focus on some of those affecting the whole European continent.

Traffic.[72] The agreement was followed by the 4 May 1910 International Convention for the Suppression of the White Slave Traffic,[73] the 30 September 1921 International Convention for the Suppression of the Traffic in Women and Children[74] (amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947), and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age.[75] The goal of these agreements was to secure effective protection against the criminal 'white slave traffic' of women or under-age girls. Consequently, the agreements were inapplicable to boys or women and girls of color and focused on prostitution as the main purpose of trafficking.

The 1904 Agreement defined trafficking as the "procuring of women or girls for immoral purposes abroad," thereby limiting the scope of its application to international, trans-border traffic.[76] "While the agreement obliged [the] states to adopt measures in the areas of information exchange, identification of victims, and supervision of employment agencies," no section of it specifically provided for victims' protection or enhanced law enforcement.[77] The law enforcement aspect of trafficking was addressed by the 1910 International Convention for the Suppression of the White Slave Traffic, which urged the states to amend national legislation to extradite and punish the offenders.[78]

Although the 1921 International Convention for the Suppression of the Traffic in Women and Children maintained the traditional focus on prostitution and sexual exploitation, explicit in the earlier agreements, the term "white slave traffic" was omitted from the title, thereby extending the application of the Convention to women and children, both girls and boys, of any race.[79]

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was approved by General Assembly Resolution 317(IV) of 2 December 1949 and entered into force 25 July 1951.[80] The Convention similarly to the earlier agreements equated human trafficking with prostitution.[81] It imposed an obligation on the States Parties to instigate criminal proceedings against "any person who, to gratify the passions of another: (1)

72. Agreement, *supra* note 18. State-parties included the UK, India, Prussia, Belgium, Spain, France, Italy, the Netherlands, Portugal, Russia, Sweden, Norway and Switzerland.

73. Convention, *supra* note 18.

74. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 96 L.N.T.S. 271 [hereinafter Women and Children]..

75. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

76. Agreement, *supra* note 18, art. 1.

77. TOM OBOKATA, HUMAN TRAFFICKING FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH 14 (MARTINUS NIJHOFF 2006).

78. Agreement, *supra* note 18.

79. Women and Children, *supra* note 74.

80. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter Exploitation] (currently, the Convention has 14 signatories and 74 state-parties).

81. *Id.*

Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person."[82] The Convention retained the 1921 gender neutral approach to trafficking. It focused on criminalization of offenders, trafficking of both men and women for prostitution inter and intra-nationally, but ignored modern forms of prostitution such as sex tourism and other forms of exploitation such as forced labor and marriage.[83]

Although providing important steps in criminalizing trafficking, the 1951 Convention and its predecessors failed to prevent its spread. They lacked universality in ratification and application: the Convention, being the most ratified instrument of all, only had 74 States Parties.[84] The focus on prostitution as main motif for trafficking overlooked other purposes and awarded inadequate protection to the potential victims. The absence of a clear-cut legal definition led to implementation problems for criminal law specialists and governmental agents, who equated trafficking with illegal migration and treated its victims in accordance with the national immigration laws.

2. The UN Convention against Transnational Organized Crime & Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons

The UN Convention against Transnational Organized Crime & Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons [85] was adopted by the General Assembly of the UN on 15 November 2000 and entered into force 29 September 2003.[86] Unlike its predecessors, the Convention is open for signature not only to states but also to regional economic integration organizations, provided that at least one Member State of such organization has signed the Convention.[87] Its main purpose is to punish and prevent crimes committed by organized criminal groups where either the crimes or the groups that commit them have an element of transnational involvement. Among the measures undertaken by States Parties in accordance with the Convention are "adoption of domestic legislation and measures to establish [relevant] criminal offenses; measures to assist and protect victims and witnesses; frameworks for mutual legal assistance; extradition; law enforcement cooperation; technical assistance and training provisions."[88]

The Convention is supplemented by two additional protocols of direct relevance to the crime of trafficking–one against the Smuggling of Migrants by Land Sea and Air and another to Prevent, Suppress and Punish Trafficking in

82. *Id.* art. 1.

83. Laura Reanda, *Prostitution as a Human Rights Question*, 13 HUM. RTS. Q. 202, 210 (1991).

84. *See* Exploitation, *supra* note 80.

85. *See* Prevent Trafficking, *supra* note 28.

86. The Protocol currently has 147 signatories and 133 state-parties from all regions and continents. *Id.*

87. *Id.* art. 36.

88. Valerie Wahl, *Trafficking in Human Beings for the Purposes of Sexual Exploitation—Legal Challenges in the Fight Against Modern Slavery in Crisis Regions: A Case Study of Bosnia and Herzegovina*, *in* PRACTICE AND POLICIES OF MODERN PEACE SUPPORT OPERATIONS UNDER INTERNATIONAL LAW 229 (Roberta Arnold & Geert-Jan Alexander Knoops eds., 2006).

Persons, especially Women and Children.[89] Although the Migrants Protocol has some relevance to the issue in discussion, as it addresses the problem of organized criminal groups smuggling migrants across the borders, it is the Trafficking Protocol that will be discussed here in more detail.

Adopted by the General Assembly, the Protocol[90] came into force on 25 December 2003 and currently has 93 parties (states and organizations) and 117 signatories.[91] It sets international legal standards on criminal characterization of the crime of trafficking, makes suggestions on the severity of criminal punishment for the trafficking offenses, as well as provides benchmarks for anti-trafficking preventive policies and effective human rights measures to protect the victims.[92] It contains provisions ensuring that trafficked persons are treated as victims and not as criminals, and, therefore, assigns them specific human rights protections, regardless of their origin, race, religion, occupation, or other characteristics.[93] These measures are direct reflection of already existent international human rights and criminal law norms that States have an obligation to respect and enforce. Thereby, the Protocol does not establish a new category of rights, but sets out specific measures aimed at enforcing the existing ones.

Article 3 of the Protocol introduces the first comprehensive international definition of Trafficking in Human Beings and exploitation for the purposes of trafficking.[94] The definition awards the status of victims of trafficking to all persons, men and women, recruited, transported or transferred by the means of coercion, deception, threat or use of force for the purpose of exploitation of sexual or other nature with or without their initial consent. According to the Protocol, traffic of children occurs in all the cases where "recruitment, transportation, transfer, harbouring or receipt of [a child]...for the purpose of exploitation" is involved even in situations where coercion or threat against the victims is not applied.[95]

The definition regards as trafficking all steps in the process: "transportation, transferring and harboring, for the purposes of exploitation."[96] Its provisions are not gender-specific and thus recognize that trafficking affects both genders

89. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Nov. 15, 2000); Prevent Trafficking, *supra* note 28.

90. *See* Prevent Trafficking, *supra* note 28.

91. Press Release, U.S. Department of State, United Nations Convention against Transnational Organized Crime (TOC) (Nov. 3, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/56006.htm.

92. United Nations Office of Drugs and Crime, UNODC and Human Trafficking, http://www.unodc.org/unodc/en/human-trafficking/index.html (last visited Sept. 27, 2008).

93. These rights include temporary resident status, temporary shelter, medical and psychological services, access to justice, compensation, and restitution. United Nations Office of Drugs and Crime, Protecting Victims of Human Trafficking, http://www.unodc.org/unodc/en/human-trafficking/protection.html (last visited Sept. 27, 2008).

94. Prevent Trafficking, *supra* note 28, art. 3.

95. *Id.*

96. Bruce Oswald & Sarah Finnin, *Combating the Trafficking of Persons on Peace Operations*, *in* 10 INT'L PEACEKEEPING: THE Y.B OF INT'L PEACE OPERATIONS 1, 5 (2006).

equally. It does not require cross-border movement and thereby includes within its scope of application the internal in-country traffic. However, being a supplement to the framework Convention on Transnational Organized Crime, the Protocol can only be applied to the offences of transnational character, i.e. those that either involve cross-border transfer of victims, are committed by foreign nationals on the territory of the given state, or as part of a larger transnational organized crime scheme.[97]

3. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

Another international document worth noting in this section is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[98] The main purpose of the Protocol, as described in its Preamble, is addressing "significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography... " through the adoption of "a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, [and] armed conflicts and trafficking in children...."[99] To this effect, the Protocol prohibits: (a) sale of children, defined as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;"[100] (b) child prostitution, defined as "the use of a child in sexual activities for remuneration or any other form of consideration;"[101] and (c) child pornography, i.e. "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."[102]

The Protocol maintains a predominantly criminal law approach, evidenced by the Article 3(1), which requires the States Parties to ensure national criminal liability for the acts related to international or domestic sale of children, including attempt to commit and complicity for participation, offering, delivering or accepting a child for the purpose of sexual exploitation; organs sales; engagement in forced labor; illegal adoption; engaging a child in prostitution or production and dissemination of child pornography.[103]

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97. Prevent Trafficking, *supra* note 28, arts. 1, 4.

98. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (Jan. 18, 2002) [hereinafter Child Prostitution].

99. *Id.* at pmbl.

100. *Id.* arts. 1, 2(a).

101. *Id.* art. 2(b).

102. *Id.* art. 2(c).

103. *Id.* art. (3)(1).

C. Case-Study: Europe

European continent, represented by the Council of Europe (CoE), is an interesting example of a region divided into various political and economic entities and hosting receiving, transit and shipping segments of the trafficking chain. Europe has witnessed a substantial increase in trafficking since the collapse of the Soviet Union.[104] Men, women, and children from Eastern Europe found themselves trapped in numerous brothels and sweatshops, engaged in prostitution, slave and bonded labor, sale of organs, and pornographic materials in the West.[105]

In order to suppress the future spread of human trafficking European States have traditionally put much emphasis on co-operation in criminal matters. In doing so they have often relied on regional instruments to suppress the act of trafficking, such as the European Convention on Extradition and its Additional Protocols[106] and the Europol Convention, as well as more general treaties containing relevant provisions, such as the Treaty of Amsterdam and European Convention on Human Rights.[107] Although co-operation in criminal matters still remains an important aspect of the European anti-trafficking policies, the recent policies of the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU), experienced a significant shift towards the protection of human rights of the victims.[108]

1. Council of Europe Convention on Action Against Trafficking in Human Beings

A plethora of agreements, resolutions and programs was implemented by the Council of Europe to fight trafficking in human beings. Among these, a central place is occupied by the two conventions briefly discussed in this paper: the Convention for Protection of Human Rights and Fundamental Freedoms[109] and the Council of Europe Convention on Action against Trafficking in Human Beings.[110]

The 2005 Convention on Action against Trafficking in Human Beings is a comprehensive treaty aimed to "protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution."[111] It contains a number of provisions to

104. Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 INT'L J. REFUGEE L. 242, 242 (2008).

105. Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and The Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 218, 225, 237, 249-50 (2007).

106. Tom Obokata, *'Trafficking' and 'Smuggling' of Human Beings in Europe: Protection of Individual Rights or States' Interests?*, 5 WEB J. CURRENT LEGAL ISSUES (2001), http://webjcli.ncl.ac.uk/2001/issue5/obok5.html.

107. *Id*

108. *Id.*

109. Protocol No. 8 for the Protection of Human Rights and Fundamental Freedoms, *done* Mar. 19, 1985, 1604 U.N.T.S. 271.

110. Convention on Action against Trafficking in Human Beings, *opened for signature* May 16, 2005, Europ. T.S. 197.

111. *Id.* art. 1(1)(b).

prevent trafficking in the supply countries as well as discourage the demand for trafficking on the recipient end.[112] It applies to all forms of trafficking, national or transnational, whether or not connected to organized crime involving persons legally and illegally residing in the country. The Convention also applies regardless of whether the victims are women, men, or children or whether their exploitation is of sexual, forced labor, slavery, servitude or organ trade nature.[113] Consequently, it creates a different, more comprehensive and all-inclusive definition of the phenomenon, which states that 'trafficking in human beings'

> shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[114]

Article 4 of the Convention establishes three conditions that must be present simultaneously for trafficking of adults to occur: action, means, and purpose. When it comes to children, however, "recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation" constitutes a sufficient trafficking threshold, according to the Convention.[115]

When compared to other international anti-trafficking instruments, the Convention contains a number of revolutionary features that target all forms of the trafficking sequence and aim to protect and prosecute all parties involved. As noted in its commentary, it is the first international binding document that explicitly recognized human trafficking as a violation of human rights and focuses primarily on assistance to victims and protection of their rights.[116] Additionally, unlike its international predecessors, the Convention establishes an independent monitoring mechanism, a Group of Experts on Action against Trafficking in Human Beings (GRETA), charged with monitoring its implementation.[117] Furthermore, as a regional instrument with a higher degree of applicability and justiciability than international treaties, the Convention recognizes the need for truly international efforts to combat trafficking and therefore attempts at creating

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112. *Id.* art. 5-6.

113. *Id.* arts. 2, 4.

114. *Id.* art. 4(a).

115. *Id.* art. 4(c); *see also* COUNCIL OF EUROPE, COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS AND ITS EXPLANATORY REPORT ¶57 (2005), *available at* http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf [hereinafter Explanatory Report].

116. Although the degree to which it is binding is severely damaged by currently low number of ratifications and consequent lack of justiciability of the Treaty in the absence of the required number of ratifications necessary for its entry into force. *See* Explanatory Report, *supra* note 115, ¶ 51.

117. *Id.* ¶¶ 51, 59.

an international regime of human rights protection and criminalization of trafficking by allowing non-European States as parties.[118]

IV. PRINCIPLES OF HUMAN RIGHTS LAW AND STATES' RESPONSIBILITY

A. Human Rights Law and Norms of Jus Cogens

Prior to discussing the applicability of human rights law and its particular normative structure to human trafficking, one must clearly understand the purpose of human rights, the very idea of which presupposes a certain concept of the human being whose rights are being protected. By assigning legal entitlements to every person regardless of gender, age, color, or occupation, the international community recognized the dignity of every person, which is to be respected under any circumstances.[119] Human rights are, therefore, "rights which a person enjoys by virtue of being human, without any supplementary condition being required."[120]

The domain of human rights under the international law includes two categories of rights: fundamental and secondary rights.[121] The fundamental human rights category includes the rights that are non-derogable.[122] They form the peremptory norms of general international law, embodied in the notions of *jus cogens* and *erga omnes*.[123] The norms of *jus cogens* introduce a category of imperative uncontestable international law existent in contrast to *jus dispositivum*,[124] and include the right to life, prohibition of torture, "genocide, slavery, racial discrimination, aggression, the acquisition of territory by force, and the forcible suppression of the right of peoples to self-determination."[125]

B. Obligations Under Human Rights Treaties

Violations contained in the crime of trafficking lead to direct infringement of a number of these non-derogable rights and appeals to specific obligations of the international community and all of its members on the basis of treaty and customary international law.[126] The 'universal' acceptance of general rules of

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118. *Id.* ¶¶ 30, 381. Instead of limiting its scope to State-Parties of the Council of Europe, the Convention was envisioned as a truly international instrument, with its membership being available not only to member States, but also to States directly involved in its drafting, that of Canada, Holy See, Japan, Mexico and the United States.

119. The principle of 'human dignity' is implicitly expressed in the Preamble of the UDHR: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world " Universal Declaration of Human Rights, *supra* note 40, at pmbl.

120. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 3 (Philip Alston, Gráinne de Búrca, & Bruno de Witte, eds., Oxford University Press 2003).

121. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 8 (Vaughan Lowe ed., Oxford University Press 2006).

122. *Id.*

123. *Id.* at 8, 268-70.

124. *Id.* at 53-54.

125. *Id.* at 54.

126. *See id.* at 53-58. While multilateral treaties on any given issue bind only those States that ratify them, customary international rules bind all State-parties unless one of them acted as a persistent objector during the rule's formation. The rule of the persistent objector is inapplicable to the formation of non-derogable peremptory norms of *jus cogens*.

customary international law justifies the *erga omnes* character of the obligations, thereby recognizing that all states have a collective interest to stop and prevent acts that are *delicta juris gentium.*[127]The provisions of the Universal Declaration and the two Covenants, together with the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, form the core of customary international human rights law.[128] Being widely accepted among the States, the provisions of these instruments become the norms of customary international law, and in theory generate obligations binding even non-signatory states.

In practice, however, the degree to which these instruments are binding varies considerably. Although, regional treaty regimes, such as the European or American systems, have strong enforcement capabilities from within the regions, their systems have limited potential for enforcing trafficking prohibitions worldwide.[129] Evidently, the rights constituting the core of ICCPR imply strict obligations, some of *jus cogens* statute, which States Parties are obliged to abide by. However, almost all of the rights contained in the Covenant are accompanied by limitation clauses which permit reduction in their scope in accordance with the strict requirement of proportionality. Moreover, the Covenant has allowed a number of reservations applicable to all but non-derogable civil and political rights. Additionally, strict applicability, judiciability and binding power of the provisions of ICCPR are limited by the magnitude of its ratification status. Despite that, the Covenant has been widely recognized by the states, it currently has 67 signatories (including China) and 153 States Parties.[130]

Covenant on Economic, Social and Cultural Rights currently has 68 signatories and 159 Parties, with Pakistan, South Africa, and the USA remaining as non-parties.[131] Since economic and social rights are "context-dependent" on the state being the potent provider of these rights, their application is limited by the scarcity of available resources. [132] Furthermore, the rights to education, health, work, etc. gain legal stature only once the fundamental rights (to life, liberty,

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127. *See* Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 307 (1999). "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, [and] as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (Second Phase Judgment).

128.TOMUSCHAT, *supra* note 120, at 32.

129.Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, Nov. 4, 1950, Europ.T.S. 5.

130.ICCPR, *supra* note 38; *see also* U.S. DEP'T OF STATE, TREATIES IN FORCE 85 (2007), *available at* http://www.state.gov/documents/organization/89668.pdf (listing the parties adopting the Covenants).

131.*See* ICESCR, *supra* note 66; *see also* Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, Sept. 26, 2008, *available at* http:www2.ohchr.org/English/bodies/ratification/3.htm (listing information regarding signatories and parties).

132.TOMUSCHAT, *supra* note 120, at 39.

movement, security, freedom from slavery and torture and non-discrimination) are fully achieved.

The rights of the child included in the International Convention on the Rights of the Child form a special category of rights. Due to its practically universal acceptance, the CRC and its two Additional Protocols created a universal binding rule of international law which prohibits child labor and outlaws the sale of children, child prostitution and pornography and the use of children in armed conflict.[133]

Although the international community has given a lot of attention to the rights of the 'third generation' such as freedom from poverty, right to development, etc.,[134] these rights do evoke binding obligations of the states and retain their political, recommendatory character. Recognized as important in achieving high standards of living and preventing such massive human rights violations, as human trafficking, they are non-universal, non-binding or justiciable on international level. Their justiciability remains within the discretion of state sovereignty and state margin of appreciation.

Also, norms establishing the legal basis for equality and non-discrimination provide "a legal standard which is intimately related to the very concept of human rights" and thereby create their own category of international human rights norms.[135] They are indispensable for the realization of many of the fundamental as well as the majority of social and economic rights and thereby require high degree of enforcement.

C. States Responsibility for Violations of Human Rights Obligations

"Legal rules, unlike rules of morality or ethics, are not addressed solely to human conscience. Since they are committed to the care of the public authorities of the community concerned, they are, or should be, vigorously defended, and sanctions should be imposed on anyone committing a breach."[136] Enforcement under international law entails state responsibility triggering a state to cease its wrongful conduct and to remedy its consequences.[137]

As provided by the ILC Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, "[e]very internationally wrongful act of a State entails the international responsibility of that State."[138] However, in cases of human trafficking, can an act of an individual or criminal network be attributed to a particular state? The Draft Articles stipulate that an act is attributable to the given state "when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international

133.CRC, *supra* note 58, arts. 34-35, 38-39.

134.*See, e.g.*, Millennium Declaration of the United Nations, G.A. Res. 55/2 ¶¶ 11-20, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

135.TOMUSCHAT, *supra* note 120, at 41.

136.*Id.* at 1.

137.CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 5 (2005).

138.Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A56/49(Vol. I)/Corr.4 (Dec. 12, 2001) [hereinafter Draft Articles].

obligation of the State" [139] The Articles also provide that a breach of an obligation of peremptory norm by a state is considered serious if it "involves a gross or systematic failure by the responsible State to fulfill the obligation,"[140] evidenced by the scope and magnitude of trafficking worldwide.

In cases where violations of human rights reach exceptionally high proportions, where they may even be classified as crimes against humanity, the individual criminal responsibility must be complemented with the responsibility of the state, often that of positive nature. The state responsibility under international law is evoked in cases where state authorities fail or neglect to protect their citizens, prevent the violations or punish the perpetrators and apply penal sanctions.[141]

Therefore, if trafficking or the events and conditions leading to the act of trafficking as well as violations occurring during the process of trafficking and subsequent exploitation are established as states' 'omissions' to prevent this conduct, they are to be considered internationally wrongful acts that evoke responsibility of the states involved.[142] Human rights violations may arise from an action of any authority, official, agent, or person who *de jure* or *de facto* is a member of the state authorities, or from an omission of the state's duty to abide by and meet the conditions necessary for the effective and general, non-discriminatory, respect of human rights.[143]

Should an internationally wrongful act occur, the Draft Articles continue, the responsible state(s) is under an obligation to provide measures for immediate cessation and non-repetition as well as relevant reparations as proscribed by the international law.[144] The responsibility of the state in reparation of the human rights violation is not criminal in nature. Traditionally, in human rights cases before the international courts, the responsibility established does not entail the punishment of the offender, instead, it entails that the guarantees for the exercise of the violated rights are safeguarded in the future, that their consequences and root-causes are remedied and that relevant indemnifications are paid.[145]

V. PRINCIPLES OF STATES RESPONSIBILITY AND HUMAN TRAFFICKING

International human rights instruments impose a duty upon the states to respect and ensure respect for human rights law, which entails the duty to prevent and investigate violations, to take appropriate action against violators and to afford remedies and reparation to those who have been injured as a consequence of such violations. Together, these duties constitute the state's responsibility to act with

139.*Id.* arts. 1-2.

140.*Id.* art. 40.

141.*Id.* art 42.

142.*Id.* art. 15.

143.Hector Gros Espiell, *International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 153 (Maurizio Ragazzi ed., Martinus Nijhoff 2005).

144.Draft Articles, *supra* note 138, arts. 29-31.

145.Espiell, *supra* note 143, at 152.

due diligence to "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted by the damages resulting from the violation."[146] Such 'due diligence' standard has been widely accepted as the measure by which state responsibility for violations of human rights by non-state actors is measured.[147]

This principle, supported by the Protocol to the CRC Convention, invokes an explicit obligation of the states to ensure "prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism," including providing international assistance to the victims and alleviating the root causes of the crimes against children.[148] European Court of Human Rights has similarly interpreted the obligations under the European Convention to include the duty of each Contracting State to:

> [S]ecure to everyone within [its] jurisdiction the rights and freedoms defined in...[the] Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.... The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.[149]

A. Obligation to Prevent—Addressing the Root-causes of Trafficking

The notion of positive obligations is supported by the Draft Articles on State Responsibility and jurisprudence of international courts and tribunals and constitutes one of the main assertions of human rights law and international law in general.[150] The sheer magnitude of the problem of human trafficking[151] leads us to believe that the process itself and the crimes it involves justify the conclusion that a threat to life and well-being of certain particularly vulnerable populations exists. The very existence of such 'reason to believe' puts the states involved under an obligation to fight poverty and discrimination as causes of trafficking. Poverty reduction calls upon the obligation of the states to provide for medical care, education, foodstuffs and basic housing, which if not implemented may incur

146.Velásquez-Rodriquez v. Uruguay, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 166.

147.*See generally* ECOSOC Report, supra note 18. Reports of Special Rapporteurs on Violence against Women, on torture, on extrajudicial, summary and arbitrary executions, and on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; by treaty bodies such as the Committee on the Elimination of All Forms of Discrimination against Women, and the Committee on the Elimination of All Forms of Racial Discrimination; by expert group meetings such as the meeting on children and juveniles in detention; in resolutions and declarations, particularly on violence against women.

148.Child Prostitution, *supra* note 98, art. 10.

149.Young James and Websters v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) at 49 (1981).

150.*See, e.g.*, Osman v. United Kingdom, 101 Eur. Ct. H.R. (1998) (discussing the notion of positive obligations).

151.600,000-800,000 people trafficked every year according to the U.S. D. of State. TIP REPORT, *supra* note 7, at 6.

accountability for violations.[152] It also requires receiving states and states of transit to co-operate to ensure full realization of economic, social and cultural rights.[153]

In the context of human trafficking, the insurance of such positive obligations is mostly applicable to the initial phase, precluding the actual execution of the act of trafficking. In other words, it implies the states' duty to address the root-causes of trafficking in order to prevent the violations from occurring. The failure of national authorities to prevent foreseeable violations of human rights, such as trafficking from impoverished or war-torn areas, constitutes a direct breach of the obligations of the States Parties to the European Convention as well as international obligations under customary international and treaty law and evokes direct state responsibility.

Among the roots of trafficking, poverty, lack of opportunity, economic stagnation, are embodied in the ICESCR, which by "recognizing the fundamental right of everyone to be free from hunger" imposes an obligation on States Parties to take, individually and through international co-operation, the measures, including specific programs, which are needed to (a) improve methods of food production, conservation and distribution through dissemination of relevant knowledge; and (b) ensuring equitable distribution of world food supplies in relation to need.[154]

Discrimination (racial, religious, and gender) and violence against women are also among the root-causes of trafficking. Therefore, to prevent human rights violations from occurring, the States Parties are obliged to "undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights."[155]

However, such measures must not be left for the source states to solve alone. Trafficking constitutes an international, transboundary criminal act that involves every country in the world, and therefore involves universal responsibility of all the states. Therefore, in accordance with human rights instruments as well as trafficking-specific conventions, states are under an obligation to take steps individually and through international assistance and cooperation to the maximum of their available resources to ensure full implementation of protective human rights measures that would fight trafficking from its roots.[156]

B. Obligation to Investigate and Punish the Offenders

The obligation to investigate, prosecute, and punish the offenders is the key feature of the rule of law. In case of trafficking, it refers to obligations of the states to criminalize the conduct of traffickers, pass necessary legislation and other measures to ensure such criminalization, coordinate information, provide sufficient training for law enforcement agents, cooperate in border control for the purpose of

152.OBOKATA, *supra* note 77, at 162.

153.ICESCR, *supra* note 66, art. 2; Comm'n. on Econ. Soc. and Cultural Rights [ECOSOC], General Comment 3, 5th Sess., U.N. Doc. E/1991/23, annex III at 86 (1991).

154.ICESCR, *supra* note 66, art. 11.

155.ICCPR, *supra* note 38, art. 3.

156.Protection, *supra* note 39, art. 1.

prevention, and provide access to justice for the victims and traffickers.[157] This obligation embodies the law enforcement strategies traditionally favored by the states. The integral part of the state obligation to investigate the offenses and punish the perpetrators is to ensure victims' direct access to justice and participation in the investigation and judicial process against traffickers.

C. Obligation to Provide Remedies to the Victims

In the context of trafficking, "[s]tates have a responsibility to provide protections to trafficked persons pursuant to the Universal Declaration of Human Rights (UDHR) and through ratification or accession to numerous international and regional instruments,"[158] rules of *opinio juris*, and customary international law.

The duty to ensure the rights of the victims of trafficking is an international obligation of *erga omnes* character.[159] "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" is the primary purpose of international human rights, and consequently, criminal law.[160] International law grants victims the right to justice and it is the responsibility of each state to ensure this right by *inter alia* allowing for adequate, meaningful and direct participation in relevant judicial proceedings, providing for representation, protection and physical and psychological rehabilitation and assistance.[161]

Protection of victims as an obligation to provide psychological assistance, educational and vocational training, temporary or permanent residence permits is explicit in the Trafficking Protocol as well as regional Conventions and measures adopted against trafficking.[162] Since the initial act of trafficking is the direct result of states' failure to protect citizens from human rights violations, international law demands states to ensure that the adequate compensation is paid to the victims.[163]

157.*See, e.g.*, Prevent Trafficking, *supra* note 28, art. 9-11 (enumerating responsibilities of State Parties to further the goals of investigation, prosecution, and punishment of offenders).

158.GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN ET AL., HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS 1, (1999). Such protections are found in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and International Labour Organization Conventions No. 29 concerning Forced Labour and No. 105 concerning the Abolition of Forced Labour. *Id.* at 1, n.1.

159.The U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights." Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/30, 96th plen. mtg.,U.N. Doc. A/RES/40/34, Annex 1 (Nov. 29, 1985) [hereinafter Justice].

160.ICCPR, *supra* note 38, art. 2(2)(a).

161.Justice, *supra* note 159, Annex, ¶ 6 (a)-(e).

162.Prevent Trafficking, *supra* note 28, arts. 2(b), 6-7.

163.*See* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); X, Y and Z v. United Kingdom, App. No. 21830/93, 24 Eur. H.R. Rep. 143 (1997); Draft Articles, *supra* note 140, art. 34.

However, trafficking involves extremely sensitive issues. Its victims are often subjected to psychological and physical abuse as well as xenophobia and persecution in the host countries.[164] By taking away their documents and identities, and restricting their freedom of movement, traffickers deter or prevent the victims' attempts to report their situations to local authorities.[165] The victims are often afraid of the measures that the local authorities may take against them as illegal migrants; afraid of possible retaliation by the traffickers in response to their testimonies; and significantly damaged psychologically and physically to become active participants in the trials against traffickers.[166] In cases of trafficking for marriage, for example, women victims of domestic violence and marital rape are unable to seek assistance of police or the judiciary as such publicity would make them subject to immediate deportation.[167]

Therefore, their access to justice and remedies has to be tailored by recognition of their special needs and must involve a somewhat different set of provisions of criminal, human rights and refugee law. The states where victims are rescued or apprehended have a special duty to ensure their safety, protection and rehabilitation inherent in the principle of *non-refoulement.*[168]

D. Principle of Non-Refoulement

This Principle has traditionally been applied to persons outside their countries who qualified for the status of refugees under the Refugee Convention of 1951.[169] According to the Convention and customary international law, a refugee is a person who is outside the country of his nationality or, "in the case of a person having no nationality, is outside any state in which he last habitually resided, and is unable or unwilling to return to, and is unable or unwilling to avail himself of, the protection of that country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion."[170] In situations where such well-founded fear of persecution exists, the states have accepted the obligation to retain the victim on their territory.[171] This obligation supersedes state sovereignty, the basic premise of

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164.OBOKATA, *supra* note 77, at 126.

165.Potts, *supra* note 37, at 229-230.

166.OBOKATA, *supra* note 77, at 126.

167.Ryszard Piotrowicz, *Victims of People Trafficking and Entitlement to International Protection*, 24 AUSTL. Y.B. OF INT'L L. 159, 162, 164, n.27 (2005).

168.Convention Relating to the Status of Refugees art. 33, July 28, 1951, 1989 U.N.T.S. 150.

169.*Id.*

170.Anton Katz, *Refugees*, in 3 INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE (John Dugard ed., 2005).

171.Sec'y of State for the Home Dep't v. Lyudmyla Dzhygun, App. No. CC-50627-99(00TH00728), April 13, 2000 (Immigration App. Trib. 2000). Immigration Appeal Tribunal recognized that the respondent belonged to a particular social group under the definition of a refugee; *see also* Convention Relating to the Status of Refugees, *supra* note 168, art. 1. The Chamber ruled that in case of the woman trafficked for prostitution to the UK from Ukraine, the government of the Ukraine failed to protect her and made it more likely for her to be persecuted by traffickers if she was returned to the Ukraine.

international law, and allows for the domination of international human rights norms over national sovereignty.[172]

Applicable also in cases of founded fear of torture or in response to perpetrated inhuman or degrading treatment,[173] *non-refoulement* has been incorporated in the national legislations of Belgium, Italy, the Netherlands, and the US, and has been widely applied in various international anti-trafficking conventions.[174] The EU Framework Decision and relevant Directives, require the EU members to issue temporary residence permits in exchange for victims' co-operation with law enforcement authorities to investigate, prosecute and punish traffickers.[175] The Trafficking Protocol only recommends that similar measures are established.[176] Article 14 of the Protocol provides that the provisions on repatriation of trafficking victims must not be applied without due regard for the victims' entitlement to *non-refoulement* under the refugee law or other existing international standards.[177]

The option of voluntary repatriation derives from the right of the individual to freely return to his or her state of origin enshrined in international human rights instruments of ICCPR,[178] ACHR,[179] CERD,[180] and Migrant Workers' Convention.[181] If the victims wish to return, their repatriation must be facilitated by all the states involved. Moreover, once returned the states of origin must ensure that the victims are reintegrated into their society through programs of physical and psychological support, education and training, and protection from retaliation by traffickers.[182]

172.*But see* Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889); Naidenov v. Minister of Home Affairs, [1995] (7) BCLR 891 (T) (S. Afr.) (providing examples of courts not meeting the proposed obligation).

173.Bensaid v. United Kingdom, App. No. 44599/98, 33 Eur. H.R. Rep. 10, 34 (2001); Mohammed Lemine Ould Barar v. Sweden, App. No. 42367/98, Eur. Ct. H.R. Jan. 19, 1999) (unreported); *Asylum Applicant on Grounds of Non-state Sanctioned Slavery*, Case Comment, 3 EUR. HUM. RTS. L. REV. 330 (1999).

174.Victims, *supra* note 29, § 107.

175.Council Framework Decision on Combating Trafficking in Human Beings (EC) No. 2002/629/JHA of July 19, 2002 O.J. (L 203) 1.

176.Prevent Trafficking, *supra* note 28, arts. 5-6.

177.Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1152 (2003). *See also* Prevent Trafficking, *supra* note 28, art. 14.

178.ICCPR, *supra* note 38, art. 12.

179.American Convention on Human Rights, *supra* note 56, art. 22(5).

180.Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 211 (May 12, 2003).

181.International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 263, 96th plen. mtg., U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

182.U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur*, ¶ 10, U.N. Doc. E/CN.4/2000/62/Annex (Jan. 18, 2000) (prepared by M. Cherif Bassiouni).

VI. COMMON BUT DIFFERENTIATED RESPONSIBILITIES: SOLUTIONS TO THE RIDDLE OF HUMAN TRAFFICKING

As noted above, trafficking sequence involves two distinct but interdependent phases: that of the act of trafficking and the subsequent exploitation such act aspires. Both phases of the sequence involve grave violations of human rights that evoke various obligations of the states in accordance with international customary and treaty law, as well as general principles. Although the violations occurring during each of the steps often overlap, they involve different sets of actors and therefore remain distinctly different from each other.

The act of trafficking itself is the moment when coercion, deceit or use of force is applied by the trafficker on a person in order to lure him or her into trafficking. The actors at this stage are the trafficker or criminal enterprise of traffickers, their victim, as well as the authorities of the state of origin, where the 'seduction' occurs. This stage is characterized by a set of legal obligations that the state holds to (a) prevent the act of trafficking from occurring; (b) protect the most vulnerable population by relieving the root-causes of trafficking such as poverty and discrimination; and (c) ensure criminal responsibility of the perpetrators. The states of potential destination also have a responsibility at this stage to assist the source states in accomplishing their responsibilities to prevent the crime of trafficking. They are also under an international obligation to ensure cooperation on criminal matters that would ensure all persons involved in criminal trafficking enterprise not to escape justice.

The remaining two stages of the trafficking sequence: (1) the transit of the victims from the state of origin (2) through transit states (3) to the state of destination, involve the same main actors: the trafficker and the victim.[183] The sequence as such is, however, aided by the (a) participation of corrupt officials in source, transit and destination states who facilitate the process of trafficking through necessary legal and immigration papers; (b) networks of potential 'employers' who either buy the traffickers' victims for exploitation or facilitate their distribution; (c) the authorities of the state of transit and destination.[184] In the respect to the victims of trafficking, the second stage of the trafficking sequence has traditionally focused on the criminal aspects of the states' obligations.[185] The states authorities have equated the trafficking victims with illegal migrants, and punished them as such, while ignoring the traffickers' crimes and granting them complete impunity.[186]

In order for anti-trafficking campaigns and programs to become effective, the states' response to victims at the transit and final stages must shift from criminal to human rights and victims' protection provided on the basis of already existent obligations inherent in international human rights, criminal and refugee law. In

183. OBOKATA, *supra* note 77, at 124-125 (describing the various methods and processes of trafficking).

184. *Id.* at 124-126.

185. *Id.* at 148.

186. *Id.* at 22-23.

other words, successful anti-trafficking strategy must be based on the differentiated notions of states responsibilities and obligations, applicable in accordance with the phases of trafficking process. Such responsibilities include obligations under the human rights, criminal and refugee branches of international law.

A. Application of Refugee Law

"International law does not recognize a general category of forced or involuntary migrant," but a fairly elaborate regime has been established for the international protection of refugees and for victims of torture.[187] Under the 1984 Torture Convention, states commit themselves not to return a person to the country of origin in cases where "there are substantial grounds for believing that he would be in danger of being subjected to torture."[188] ICCPR Article 7 also contains an implicit *non-refoulement* obligation for the persons facing torture or cruel, inhuman, or degrading treatment or punishment.[189] Similarly, the European Human Rights Convention has been interpreted to prohibit the return of a person to a state in cases when the real risk of torture and inhuman and degrading treatment and punishment exists.[190] Allowing for the principle of *non-refoulement* to become a part of the institutionalized response to human trafficking would promote the victims to come forward and instigate proceedings against their traffickers without fearing persecution by the local authorities for their non-documented illegal status.

The Additional Protocol on Human Trafficking contains specific provisions discussing the possibility of assigning a refugee status and consequent possible naturalization of the victims of trafficking by the recipient states.[191] It requires parties to adopt measures to assist the victims, including, possibly, permitting them to remain on their territory.[192] By allowing for the possibility of non-repatriation, the Protocol recognizes that there may be no option for the victim to return to the state of origin, parallel to the provisions of the Convention Relating to the Status of Refugees of 1951.[193] Similar to the Refugee Convention, the Trafficking Protocol is based on the premise that victims' protection must be provided by the state of nationality or legal residence of the victims. Only unavailability of such protection leads to the state obligation to consider granting victims asylum. [194]

187.T. Alexander Aleinikoff, *International Legal Norms and Migration: a Report*, in MIGRATION AND INTERNATIONAL LEGAL NORMS, 10 (T. Alexander Aleinikoff & Vincent Chetail eds., T.M.C. Asser 2003).

188.Torture, *supra* note 45, art. 3 (containing an absolute prohibition of refoulement).

189.ICCPR, *supra* note 38, art. 7.

190.Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 90-91 (1989); Chahal v. United Kingdom, 11 Eur. Ct. H.R. 413, 454-55 (1996).

191.Prevent Trafficking, *supra* note 28, art. 14.

192.*Id.* art. 7.

193.*Id.* art. 8; *see also* Convention Relating to the Status of Refugees, *supra* note 168, arts. 7-8.

194.Piotrowicz, *supra* note 167, at 162.

According to Article 1A(2) of the Refugee Convention a refugee is someone who:

> owing to a *well-founded fear* of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, is *outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[195]

For the purposes of trafficking, the elements of well-founded fear, membership of a particular social group and location outside the country of nationality or permanent residence are especially pertinent. For returning victims of trafficking with their past known to the society, the "fear of rejection or ostracism may well amount to a fear of persecution, depending on the society from which he or she originates."[196] The triggering of the Refugee Convention in these cases will solely depend on the severity and well-foundedness of their fear of persecution derived from the victim's trafficking experience.[197]

Additionally, the Refugee Convention may apply to the victims of trafficking through their membership of a particular social or political group: "A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, and which sets them apart. The characteristic will ordinarily be one that is *innate, unchangeable or which is otherwise fundamental to human dignity....* "[198]

It may be argued that trafficked persons, especially those trafficked for the purposes of sexual exploitation, form a special social group ostracized by the communities of their home states. This view has been supported by multiple cases ruling that former sex trade workers constituted a particular social group on the basis of them having been trafficked for social exploitation from a one given state.[199]

Some of the victims have become trafficked due to the widespread discrimination against them on the basis of their race, religion, or nationality. In cases where the applicant for international protection is a woman, "account shall be taken of the fact that persecution, within the meaning of the Geneva

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195.Convention Relating to the Status of Refugees, *supra* note 168, art. 1(A)(2) (emphasis added).

196.Piotrowicz, *supra* note 167, at 167 (noting that upon her return, a victim of sex trafficking may be ostracized by her family or community as the result of her involvement in sex trade).

197.*Id.*

198.United Nations High Commissioner for Refugees, *Summary Conclusions: Membership of a Particular Social Group, in* REFUGEE PROTECTION IN INTERNATIONAL LAW, 312-14 (Erika Feller et al. eds., 2003) (emphasis added).

199.Islam v. Sec'y of State for the Home Dep't and Ex Parte Shah, 2. A.C. 629, 652 (H.L. 1999) (appeals taken from Court of Appeal); Immigration and Refugee Board Case, [1999] T98-06186 (Can.); Sec'y of State for the Home Dep't v. Lyudmyla Dzhygun, App. No. CC-50627-99(00TH00728), April 13, 2000 (Immigration App. Trib. 2000); Appellant v. Sec'y of State for the Home Dep't, Case No. UKIAT 00023, 14 (July 7, 2003)(Immigration App. Trib. 2003); Petition of Olga Shimkova, Home Department Letter of June 13, 2002, 62 (Outer House, Court of Session, Dec. 23, 2003).

Convention, may be effected through sexual violence or other gender-specific means."[200] In such situations, where women as a group are persecuted against, the persecution ground "'membership of a particular social group' could apply," triggering the application of the Refugee Convention.[201]

The identity of the trafficked persons, their gender and conditions under which they have been trafficked and abused represent unchangeable facts that lead to a strong possibility of their further persecution if returned home. Furthermore, the membership of these women in the given social group of forcefully trafficked for sexual exploitation women is not resulting from their voluntary decisions. Their involuntary status is an innate and unchangeable condition that according to UNHCR standards calls to the international responsibility for protection and non-repatriation.

B. International Criminal Law Implications

Trafficking weakens the territorial integrity of states through violations of criminal and immigration laws. It also undermines the rule of law and political foundations through widespread violence and corruption employed by trafficking groups. The Trafficking Protocol, its Framework Convention, as well as the European Union, OSCE initiatives–and virtually all of the recently passed anti-trafficking laws and directives–seek to strengthen the criminal justice response through tighter crime and immigration control enhanced by larger states' cooperation.[202]

Availability and implementation of adequate laws to identify trafficking as a criminal offence and prescribe realistic penalties is a necessary step towards the establishment of workable anti-trafficking policies. Policy-makers concerned with the immigration side of trafficking exclusively limit their anti-trafficking work to amplification of repressive laws, while disregarding the necessity to instigate preventative and protective measures and thereby failing to stop the proliferation and spread of slavery and forced labor. Although strategies for communication and co-operation between law-enforcement agencies of various countries are important tools in combating trafficking, foreign assistance to the source countries must involve more than exchanges among police agencies. It must, *inter alia*, entail development strategies and substantial financial assistance for programs that emphasize educational opportunities for girls and economic security for men and women.

Furthermore, the work of international criminal tribunals may serve as an additional deterrent for continuous spread of trafficking. Enslavement of persons is a punishable criminal offense that evokes both individual and group criminal liability under the statutes and jurisprudence of Rwanda and Yugoslavia Tribunals

200. *Commission Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, at 15-16, COM (2001) 510 final (Sept. 12, 2001).

201. *Id.*

202. Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Community*, 54 INT'L & COMP. L.Q. 445, 445 (2005).

and the International Criminal Court. Moreover, it may also constitute a crime against humanity.[203] However, in order to qualify as such, enslavement must not only entail an ability to buy, sell or trade people.[204] It is the continuous "duration of the suspected exercise of powers attaching to the right of ownership"[205] as well as evidence of "widespread and systematic"[206] abuse that play a major role in determining whether a particular case of enslavement can be regarded as a crime against humanity and be consequently considered as a gravest punishable offense under the international criminal law. In accordance with these parameters, the act of trafficking may only be regarded as a crime against humanity if the traffickers themselves directly exercise subsequent ownership of the victims; and if their practices involve an organized widespread criminal enterprise specifically aimed at 'multiplicity of victims' who are members of civilian population.[207] Although, the threshold of gravity imposed by the ICC only permits the most atrocious situations of human trafficking to potentially fall under its jurisdiction, such possibility (i) confirms that trafficking is an international crime of atrocious proportions; (ii) elevates the standing of the crime of trafficking vis-à-vis other human rights violations; (iii) attracts attention of international community, assigning the anti-trafficking strategies a primary role within national policy-making; and (iv) serves as a deterrent for future perpetrators.

The threshold of gravity established by the international criminal tribunals is indeed high and probably unreachable by the crimes of traffickers. The Trafficking Protocol and Council of Europe Trafficking Convention establish much lower criminal thresholds that allow the smaller scale perpetrators, who may not necessarily be a part of larger criminal enterprises and networks, to be tried by national and international human rights courts.[208] Their threshold is based on the identification of criminal intent of the perpetrators to facilitate the exploitation. The criminal intent element triggers the applicability of the Protocol and Convention and is sufficient proof necessary to sustain criminal liability.[209]

However, in the absence of special judicial bodies created by the Protocol and the CoE Convention to adjudicate on the violations of human trafficking, this role

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203.*See, e.g.*, Prosecutor v. Kunarac, Indictment IT-96-23, Decision on Motion for Acquittal, ¶ 542 (Feb. 22, 2001).

204.*Id.*

205.*Id.*

206.United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July17, 1998, *Rome Statute of the International Criminal Court*, art. 7(2)(c) U.N. Doc A/CONF.183/9 (July 17, 1998) ("Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.").

207.*See* Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment and Opinion, ¶ 648 (May 7, 1997); Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 206 (Mar. 3, 2000); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998); International Law Commission [ILC], *Report of the International Law Commission on the Work of its Forty-Eighth Session*, ¶ 17-22, U.N. Doc. A/51/10(Supp) (May 6-July 26, 1996) (illustrating that isolated acts committed by perpetrators do not qualify as crimes against humanity).

208.*See* Prevent Trafficking, *supra* note 28; Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report arts. 18-26, May 16, 2005, C.E.T.S. 197.

209.*See* Prevent Trafficking, *supra* note 28; Council of Europe, *supra* note 208.

is delegated directly to the states. Under this obligation, the States Parties are required to ensure full access to justice for victims of trafficking violations, appropriate legislative reforms to ensure full accountability and transparency of the trials, adequate charges and penalties, and cooperation and mainstreaming of judicial procedures in trafficking cases. In fact, the progress achieved by implementation of these measures is evident in documented substantial increases in the numbers of alleged offenders facing trial. [210] The Special Monitoring Group that will be created by the CoE Convention upon its entry into force may play an important role in ensuring the comprehensiveness and effectiveness of states policies in this regard.

VII. CONCLUSION

Trafficking in human beings is one of the most brutal violations of various branches of international and national laws of various countries. Its tentacles embrace the globe from every side. It is a truly international side effect of globalization, which in turn demands a universal policy program, capable of overturning the rate of ever-growing numbers of its victims.

Strikingly similar to the practice of slavery, trafficking requires international measures similar to those once applied to eliminate the practice of slavery. Elimination of legal justification of slavery by itself was an essential precursor to further practical measures to prevent the future slavery-like practices. The failure of the states to provide the rehabilitative measures to ensure the avoidance of future perpetual dependence of the former slaves on their 'masters' left the victims of slavery in limbo of dependence and resentment.[211] Therefore, the measures to prevent such situation in case of modern forms of slavery need to include specific provisions on: (a) the methods and the procedure for the actual release of the enslaved; (b) sufficient economic autonomy of the liberated slaves; and (c) their reintegration in the society as equal citizens.

"Only when comprehensive human rights background to trafficking is fully understood, and states commit themselves to tackle human rights violations occurring along the entire spectrum of the traffic chain, will we begin to see a diminution in human trafficking."[212] In order to be successful, the international response to trafficking needs to recognize the victims and their rights, and be more reflective of the views of those most affected. Preventing and punishing trafficking requires a multinational multi-level coordinated legal norm development, aided by communication on criminal matters, mutual assistance in law enforcement, provision of social services to the victims, harmonization of labour, immigration and refugee laws, and economic development and women empowerment programs.[213] Such norm development has to be based on shared but differentiated responsibilities of all the states of the world, derived from their

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210.TIP REPORT, *supra* note 7, at 8.

211.David Ould, *Trafficking and International Law, in* THE POLITICAL ECONOMY OF NEW SLAVERY 55, 72-73 (Christien van den Anker ed., 2003).

212.Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1165 (2003).

213.*Id.* at 1145.

international and regional human rights obligations and determined on the basis of the role of each of the given states in the sequence of trafficking.

The human rights victims-centered approach must be complemented by the measures of criminal law striving to achieve accountability for traffickers. Intensified governmental cooperation in law enforcement, non-discriminative immigration laws, substantial guarantees of non-impunity for traffickers, and establishment of workable criteria distinguishing the victims of trafficking from other migrants would give teeth to the human rights framework and ensure its justiciability by assigning responsibility on all states to implement pertinent legislative measures serving as both guarantee of human rights and deterrent for future violations.

The integration of the *non-refoulement* principle of refugee law as the deportation relief for the victims of trafficking would also allow for additional transparency and willingness of the victims to seek justice with the authorities of the recipient and transit states. Cooperation with law authorities, however, should not be a prerequisite for the application of the principle, as its focus should remain not with criminalization but with relief of threat and hardship facing the victim upon return. It may also result in subsequent adjustment of the traits of behavior of traffickers and illegal migrants and may lead to undesired consequences of increased rates of trafficking and smuggling. To respond to this danger, specifically tailored immigration policies need to establish criteria necessary to minimize such consequences.

The Trafficking Protocol is a symbolic tool that embodies the direction that the international community has taken in its fight against trafficking. It represents the first fully international legal instrument that involved not only representatives of governments and diplomats, but members of civil society, specialized agencies of the United Nations and NGOs, whose presence allowed for a larger emphasis to the human rights norms evident in its text. The Protocol, however lacks universality in ratifications,[214] and has a number of limitations such as addressing trafficking only as a transnational offence,[215] which slow its effectiveness down. A valuable alternative to the Protocol is offered by the Council of Europe Convention against Trafficking. A truly comprehensive international, albeit non-universal, strategy encompassing all of the existent frameworks of criminal, human rights, immigration and labor law, as well as elements of refugee protection and victims' rights, represents the way forward for the international community in its fight against trafficking. States-signatories of the Convention must ensure its rapid entry into force and extended scope of application as the new strategy against trafficking.

214.*See* Prevent Trafficking, *supra* note 28 (acknowledging that the Protocol currently has 113 state-parties with China, India, Indonesia, Iran, Ireland, Israel, Japan, Kazakhstan, Morocco, Pakistan, Saudi Arabia, Sierra Leone, Singapore, Sri Lanka, Syria, Thailand, Uganda, Uzbekistan, Vietnam, Yemen, Zimbabwe still non-parties to the Protocol. For more information on ratification see: http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html).

215.Prevent Trafficking, *supra* note 28, art. 3(2) (recognizing that the definition of 'transnational' in the Protocol is fairly wide).

STATE RESPONSIBILITY: A CONCERTO FOR COURT, COUNCIL AND COMMITTEE

RACHAEL LORNA JOHNSTONE*

I. INTRODUCTION

The judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention case), released by the International Court of Justice (the Court) on 26th February 2007, has thrown up a number of interesting issues to keep scholars of international law entertained for some years.[1] Amongst these are the rules of state responsibility in international law. In the Genocide Convention Case, the Court relied upon the narrow regime of state responsibility that they had introduced in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua*) over 20 years previously, rejecting a stronger doctrine suggested by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case.[2] The Court's conservative interpretation of state responsibility does not immediately appear to be in harmony with the regimes of state responsibility envisaged by other United Nations institutions, notably, state responsibility for terrorist activities as understood by the Security Council (the Council), and the tertiary scheme of state responsibility for violations of human rights adopted and applied by the United Nations human rights treaty bodies (treaty bodies).[3]

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1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188 (Feb. 26, 2007) [hereinafter Genocide Convention case].

2. Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 110 (June 27) [hereinafter Nicaragua]; Prosecutor v. Tadić, No. IT-94-1-A, Judgment, ¶¶ 131, 137 (July 15, 1999) [hereinafter Tadić].

3. For discussion of the tertiary framework of state responsibility as applied by human rights treaty bodies see, for example, Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679, 711 (1996) (identifying the three dimensions of state obligations relating to "any given human right" as the obligation to respect, the obligation to protect, and the obligation to fulfill).

After this short introduction, Part II will discuss the rules of state responsibility applied by the Court in the Genocide Convention case, in light of the International Law Commission (ILC) Articles on State Responsibility, *Nicaragua* and *Tadić*.[4] Part III is devoted to an examination of resolutions of the Council pertaining to terrorism, particularly following the terrorist attacks of September 2001, and the vision of state responsibility implicit therein. In Part IV, the author will examine the adoption of the tertiary scheme of state responsibility for human rights adopted by the treaty bodies which is illustrated in general comments, concluding comments on state reports, and where appropriate, views on communications. To conclude in Part V, the author will argue that the different schemes of state responsibility can all be reconciled with the ILC Articles and that the apparent differences between these three fields are in fact differences of primary rules. The answer to the question "who is the state?" is the same in all three cases.

The focus is exclusively on the institutions of the United Nations and, for that reason, developments in the realm of state responsibility in other institutions, such as the European Court of Human Rights or in broader counter-terrorism literature will not be directly addressed.

II. THE INTERNATIONAL COURT OF JUSTICE AND STATE RESPONSIBILITY FOR GENOCIDE

A. The International Court of Justice

Formally at least, judicial decisions are binding only between the parties to each dispute.[5] They are formally considered only "subsidiary sources" of international law, alongside legal commentaries.[6] Treaties, customary international law, and legal principles of civilized nations are preferred. Nonetheless, the Court's decisions are highly influential both on the academic study of international law and state practice. Indeed Dupuy states: "everyone accepts that its judicial interpretations are for the most part binding on all the subjects of international law."[7] The Statute of the Court does not indicate any hierarchy amongst courts, referring only to "judicial decisions" without indicating any particular fora.[8] Nevertheless, the practice of the Court, perhaps unsurprisingly, has been to cite its own decisions with a degree of gravitas that is perhaps not shared in its discussion of decisions of other international tribunals or domestic courts. In the Genocide Convention case, the Court clearly preferred its own 20 year old *Nicaragua* ruling

4. Int'l L. Comm'n, *Report of the International Law Commission on the Work of its fifty-third session*, art. 6, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].

5. Statute of the International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993 [hereinafter Statute of the Court].

6. *Id.* art. 38(1)(d).

7. Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law*, EUR. J. LEGAL STUD., Apr. 2007, at 1, 5, http://www.ejls.eu/index.php?mode=present&displayissue=2007-04 (follow hyperlink to Dupuy's article).

8. Statute of the Court, *supra* note 5, art. 38(1)(d).

to the more recent *Tadić* decision of the ICTY.[9] It makes no reference to the jurisprudence of the Iran-United States Claims Tribunal despite its influence on the development of the law of state responsibility.[10]

B. The Genocide Convention Case

Ultimately, in the Genocide Convention case, Serbia (formerly the Federal Republic of Yugoslavia) was not found to have any responsibility for the commission of genocide, conspiracy or incitement to commit genocide, or complicity in genocide.[11] It was, however, considered responsible for violating the Genocide Convention to the extent that Serbia failed to prevent the genocide and failed to cooperate adequately with the prosecution of individuals suspected of involvement.[12] It was also held to have failed to comply with the provisional measures of the Court, issued in 1993, which required it specifically to "take all measures within its power to prevent genocide."[13]

Before approaching questions of state responsibility, it is important to note that the *only* question before the Court was responsibility for genocide, not for any other international wrongs, such as acts of aggression or violation of the duty not to intervene in the internal affairs of a sovereign state.[14] The only matter for which the Court determined that genocide had been proven to have been committed was the massacre at Srebrenica.[15] Therefore, the question of state responsibility in the case pivots on that sequence of events. A state can only commit genocide, or be complicit in the commission of genocide, to the extent that genocide actually takes place.[16] Serbian responsibility for any other atrocity during the conflict was not assessed by the Court.

On the other hand, responsibility for conspiracy to commit genocide, incitement to commit genocide, or attempting to commit genocide does not necessarily require that genocide be successfully carried out.[17] Indeed, to the extent

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9. Genocide Convention case, *supra* note 1, ¶¶ 405-07.

10. *See generally* David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109 (Richard B. Lillich & Daniel Barstow Magraw eds.,1998) [hereinafter THE IRAN-UNITED STATES CLAIMS TRIBUNAL]. *See also* Jamison Selby Borek, *Other State Responsibility Issues*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL 303, *supra*.

11. Genocide Convention case, *supra* note 1, ¶¶ 471(2)–(4).

12. *Id.* ¶¶ 471(5)-(6).

13. *Id.* ¶ 471(7).

14. In their identification of the actus reus of genocide, a litany of atrocities is recited in the Court's judgment. Although the Court could not rule on whether they constituted war crimes or crimes against humanity, the detail in which they are recited in the judgment indicates that the Court wanted them on public record. Sandesh Sivakumaran argues that: "[a]s jurisdiction was founded solely upon the Genocide Convention, the Court could not characterise these atrocities as war crimes or crimes against humanity, however, in practice, it came close to doing precisely that." Sandesh Sivakumaran, Case Comment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* 56 INT'L & COMP. L.Q. 695, 698 (2007).

15. Genocide Convention case, *supra* note 1, ¶ 376.

16. *Id.* ¶ 431.

17. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102

that genocide is actually committed, there can be no charge of attempt on the same facts.[18] Nonetheless, even on these points, the Court contained its analysis of attribution largely to the events at Srebrenica.[19]

All kinds of questions can be asked about the standing of the parties,[20] the definition of genocide both in the Convention and in customary international law,[21] imputation from non-disclosure by Serbia,[22] the burden of proof,[23] the degree to which the Court can make inferences from the circumstances when direct evidence is almost impossible to obtain,[24] the limitations on the Court vis á vis fact-finding,[25] and the Court's reluctance to "put the pieces together,"[26] but these questions, interesting as they are, do not bear directly on the issue of attribution of responsibility and so will not be addressed further.

It must be borne in mind that the wrong (i.e. the genocide) was committed not in Serbia but in Bosnia and Herzegovina (Bosnia) against Bosnian victims. Any potential responsibility of Serbia for actions taking place at Srebrenica in 1995 cannot depend on some kind of territorial link, as it might have, had the genocide occurred within the territory of Serbia.[27] In this respect, the case can be distinguished from questions of responsibility for "harboring terrorists" when those terrorists are actually on the soil of the respondent state and from responsibility for human rights violations committed by non-state actors when both the perpetrators and victims are within a state's territory.[28]

C. State responsibility for genocide

Bosnia attempted to pre-empt the need for an investigation on the facts of state responsibility by arguing that Serbia had acknowledged responsibility in a statement by its Council of Ministers.[29] This was rejected by the Court as a "political statement" rather than an admission of liability.[30] The Court was

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Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

18. Genocide Convention case, *supra* note 1, ¶ 380.

19. The Court briefly commented that there was no indication of genocide having been incited elsewhere. *See id.* ¶ 417. Bosnia did not make any claim for "attempt." *See id.* ¶ 416. *See infra* text accompanying note 66.

20. Genocide Convention case, *supra* note 1, ¶¶ 80-141.

21. *Id.* ¶¶ 142-201.

22. *Id.* ¶¶ 204-05.

23. *Id.* ¶¶ 209-210.

24. *Id.* ¶ 207. *See also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9) [hereinafter Corfu Channel].

25. Genocide Convention case, *supra* note 1, ¶¶ 211-230.

26. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), ¶¶ 42, 48 (Feb. 26, 2007) (dissenting opinion of Vice-President Al-Khasawneh), *available at* http://www.icj-cij.org/docket/index.php?p1=3&k=f4&case=91&code=bhy&p3=4 [hereinafter Al-Khasawneh dissent].

27. *But see* Corfu Channel, *supra* note 24, at 18.

28. *See infra* Parts III, IV.

29. Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L.J. 871, 902-03 (2008).

30. Genocide Convention case, *supra* note 1, ¶¶ 377-78. Al-Khasawneh disagreed. *See* Al-Khasawneh dissent, *supra* note 26, ¶¶ 56-58.

therefore obliged to consider both the law of state responsibility and the application of that law to the facts of the case.[31]

The Court recognized the established principle that states bear responsibility for acts or omissions of their own organs, de jure or de facto, or by non-state actors operating under the "direction or control" of the state.[32] Articles 4 and 8 of the ILC Articles were accepted as "customary international law" without further discussion.[33] They are worth replicating in full:

> Article 4
>
> Conduct of organs of a State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.
>
> Article 8
>
> Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Relying on the "customary international law" of state responsibility, the Court rejected any notion that the rules of state responsibility for genocide were in any way lex specialis.[34] Although the Genocide Convention creates treaty obligations, the (secondary) rules of state responsibility for violating those obligations are the general ones. No special scheme applies.[35]

The principle perpetrators recognized by the Court were not, under Serbia's internal law, its "organs."[36] Straightforward attribution of responsibility according to Article 4 was therefore precluded, notwithstanding Bosnia's protestations to the contrary. Nonetheless, states may not hide behind their internal legal order to evade international responsibility and the Court discussed at length whether or not those involved were de facto agents of Serbia, relying on the *Nicaragua* test of "complete dependence" in light of Article 4 of the ILC Articles.[37]

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31. Genocide Convention case, *supra* note 1, ¶¶ 385-438.
32. *Id.* ¶ 384.
33. *Id.* ¶¶ 385, 398.
34. *Id.* ¶ 401.
35. *Id.*
36. *Id.* ¶¶ 386-89.
37. *Id.* ¶¶ 391-92. *See also* Nicaragua, *supra* note 2, ¶ 109, at 62. Although not cited by the Court, this is also in line with the findings of the Iran-US Claims Tribunal. *See generally* THE IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 10. *See also* ILC Articles, *supra* note 4, cmt. to art. 4, ¶

The Court accepted on the facts that those involved had been recruited prior to the independence of Bosnia and Herzegovina and that the Serbian government had provided military and financial support in the form of weapons and salaries.[38] Close ethnic, political and financial links existed between the perpetrators (de jure organs of the "non-State" entity of Republika Srpska in Bosnia) and the Belgrade Government.[39]

But the Court considered that, in light of *Nicaragua:*

> [T]o equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above [Nicaragua] expressly described as "complete dependence". It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it.[40]

The Court went on to interpret "complete dependence" as meaning that the perpetrators were "lacking any real autonomy."[41] Recognizing the Bosnian Serb's "qualified, but real, margin of independence" on the one hand, and their reliance on Serbian support "without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities,'" the Court determined that the former factor was the key, and that, since the Bosnian Serb forces had some modicum of autonomy, they were not to be considered organs of Serbia.[42] Therefore, they would not be considered organs and as a result, their actions would not automatically be attributable to Serbia.

The Court then turned to the question of whether, although not organs of Serbia *in general,* the perpetrators were acting under Serbian "direction and control" "in carrying out the conduct" in light of Article 8.[43] The state will be responsible for non-state actors to the extent that "they acted in accordance with that [s]tate's instructions or under its effective control."[44] This responsibility requires direction or control over specific, identifiable events, in this case, the Srebrenican genocide. General control over the direction of operations is inadequate; there must have been specific control over the international wrongful

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11, at 91 (the use of "includes" in art. 4(2) clearly indicates that internal law is not exhaustive). *See also* Paolo Palchetti, *Comportamento di Organi di Fatto e Illecito Internazionale Nel Progetto di Articoli Sulla Responsabilità Internazionale Degli Stati, in* LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI 3, 5-6 (Marina Spinedi et al. eds., 2006).

38. Genocide Convention case, *supra* note 1, ¶¶ 238-39, 388.

39. *Id.* ¶¶ 240, 422.

40. *Id.* ¶ 393.

41. *Id.* ¶ 394.

42. *Id.* ¶ 394 (quoting Nicaragua, *supra* note 2, ¶ 111, at 63).

43. *Id.* ¶ 398.

44. *Id.* ¶ 400.

act.[45] The Court explained that "[i]t must however be shown that this 'effective control' was exercised, or that the [S]tate's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[46] Serbia would still be responsible if it could be established that "the physical acts constitutive of genocide that have been committed by organs or persons other than the [S]tate's own agents were carried out, wholly or in part, on the instructions or directions of the [S]tate, or under its effective control."[47]

The Court was forced to acknowledge the *Tadić* ruling of the Appeals Chamber of the ICTY in 1999, which had applied a less strict test of "overall control."[48] The ICTY Appeals Chamber had determined that the test of state responsibility for the actions of combatants was essential to the determination of the character of the Bosnia conflict as "international" and, relying on its own interpretation of the law of state responsibility, held that Serbia had sufficient control over actors in the Bosnian conflict both to engage its own responsibility and to render the conflict international in character.[49] The Appeals Chamber, however, misread *Nicaragua* as introducing a double test of "complete dependence" *and* "effective control" rather than two independent tests of "complete dependence" *or* "effective control."[50] Nevertheless, it rejected the *Nicaragua* test (so understood) as unpersuasive and appealed both to the 1998 draft of ILC Article 8 and judicial and state practice (predominantly jurisprudence from outside of the Court).[51] Instead, the Appeals Chamber held that the appropriate test in military or paramilitary cases should be one of "overall control", rather than "effective control."[52] It further defended this test by distinguishing between state responsibility for individual actors and responsibility for the operations of "organised and hierarchically structured group[s] such as a military unit" where effective control may not be necessary to achieve the desired objectives.[53] Given

45. Giulio Bartolini, *Il Concetto di "Controllo" sulle Attività di Individui Quale Presupposto Della Responsabilità Dello Stato, in* LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI, *supra* note 37, at 25, 28 .

46. Genocide Convention case, *supra* note 1, ¶ 400.

47. *Id.* ¶ 401.

48. Tadić, *supra* note 2, ¶¶ 98-145; Genocide Convention case, *supra* note 1, ¶¶ 402-05. For commentary on the Tadić case as it pertains to state responsibility, *see, e.g.,* André J.J. De Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić case and attribution of acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia,* 72 BRIT. Y.B. INT'L L. 255 (2001); Bartolini, *supra* note 45; Leo Van Den Hole, *Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadić,* 32 SYRACUSE J. INT'L L. & COM. 269, 276-85 (2005); Marko Milanović, *State Responsibility for Genocide,* 17 EUR. J. INT'L L. 553, 576-81(2006); Sivakumaran, *supra* note 14, at 701-03.

49. Tadić, *supra* note 2, ¶¶ 104, 162.

50. *Id.* ¶ 112.

51. *Id.* ¶¶ 116-45. The 1998 draft art. 8 of the ILC Articles is identical to that finalized in the second reading.

52. *Id.* ¶ 145.

53. *Id.* ¶ 120; Bartolini, *supra* note 45, at 30.

this lower threshold of overall control, on the facts, it found that the test of "overall control" by the Yugoslav army (i.e. de jure organ of Serbia) of Bosnian Serb forces had been met.[54]

Nicaragua and *Tadić* could further have been distinguished on the facts, as the links between the state and those violating international law seem considerably closer in the latter case.[55] The Presiding Trial Judge, although outvoted, argued that, on the facts, even the stricter test of effective control had been met.[56] Furthermore, although the Appeals Chamber did not apply the facts to the test of effective control, its discussion of the facts certainly indicates a degree of control considerably greater than that in *Nicaragua*.[57]

The Court chose to "distinguish" the *Tadić* judgment to the extent that it bears on state responsibility, but it did so with barely concealed disdain, suggesting that the ICTY had no business making assertions about "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it."[58] The *Nicaragua* test was thus confirmed as the correct one and is thus further entrenched in international law.

It should be noted that Article 8 of the ILC Articles requires "direction or control" but is silent as to the degree of control.[59] The commentary describes both the *Nicaragua* tests and *Tadić* tests and does not explicitly indicate a preference.[60] However, it implies that the "overall control" test in *Tadić* may not go to the heart of the law of state responsibility since it was incidental to a finding on international humanitarian law rather than a direct finding on state responsibility per se – something that is in any case outside of its jurisdiction.[61]

D. Conspiracy and incitement to commit genocide

Bosnia did not claim that Serbia had "attempted" to commit genocide but, nonetheless, the question of participation by conspiracy, incitement and complicity still had to be considered by the Court. It dealt with conspiracy and incitement in summary fashion, dedicating only one paragraph to both, to reject the possibility of Serbian responsibility.[62] It considered only events at Srebrenica. The perpetrators had been shown to be neither agents of Serbia, nor under its "effective control" and the massacre is later in the judgment characterized as a somewhat spontaneous action.[63] To the extent that the Court even accepted there had been much of a

54. Tadić, *supra* note 2, ¶ 156.

55. Van Den Hole, *supra* note 48, at 280-85; Bartolini, *supra* note 45, at 28-29.

56. Prosecutor v. Tadić, Case No. IT-94-1-T, McDonald Dissent, ¶ 34 (May 7, 1997).

57. Tadić, *supra* note 2, ¶¶ 146-62.

58. Genocide Convention case, *supra* note 1, ¶ 403. *See also* Tadić, *supra* note 2, ¶¶ 69-71 (argument of the prosecution); Al-Khasawneh dissent, *supra* note 26, ¶¶ 36-39.

59. ILC Articles, *supra* note 4, at 45.

60. *Id.* cmt. to art. 8, ¶¶ 4-5, at 105-06.

61. *Id.* cmt. to art. 8, ¶ 5, at 106. *See also* Bartolini, *supra* note 45, at 30 (suggesting that the ILC distanced itself from Tadić).

62. Genocide Convention case, *supra* note 1, ¶ 417.

63. *Id.*

"conspiracy," rather than a spur of the moment decision, it rejected Serbian involvement in it.[64] Incitement was likewise rejected.[65]

The Court briefly added that there was no "precise and incontrovertible evidence" that Serbia had "incited genocide" on any other occasion.[66] No such general statement is made in the case of conspiracy. Conspiracy has its origins in the common law and does not require that any (other) crime be committed or attempted.[67] It has no direct equivalent in the civil law systems under which responsibility for planning criminal activities requires some "material element" to have been committed.[68] Focusing only on Srebrenica, the Court does not consider the possibility that Serbia may have participated in an overall plan to commit genocide in Bosnia, or to commit genocide on some other occasion. Incitement is an offence at common law even in the absence of actus reus; in fact, if the actus reus is fulfilled, the inciter (counselor) is instead considered as an accessory.[69] In the civil law, responsibility for incitement requires some attempt.[70]

The Court stated that it considered, both for "conspiracy to commit genocide" and "direct and public incitement to commit genocide" "as is appropriate, only the events at Srebrenica."[71] If, indeed, this *is* appropriate, conspiracy and incitement to genocide in international law are (now) *only* crimes to the extent that they are successfully carried out.[72] This will have major ramifications if it is carried over into the realm of international criminal law and individual responsibility, to the extent that conspiracies to commit genocide and incitement to genocide, in the absence of any attempt, will not be considered crimes.

E. Complicity in genocide

Complicity in genocide (or any other crime) requires the crime actually have occurred.[73] The Court necessarily limited its consideration to Srebrenica and found complicity to be synonymous with "aid or assistance."[74] The material element, or actus reus, was established as:

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64. The Court does not directly address the matter of whether there had been a conspiracy to commit genocide at Srebrenica. One would imagine that such events require at least minimal discussion and preparation (i.e. conspiracy); on the other hand, later in the case, the Court indicates that the Srebrenican massacres were somewhat impulsive. Genocide Convention case, *supra* note 1, ¶ 423.

65. *Id.* ¶ 417.

66. *Id.*

67. Criminal Law Act, 1977, c. 45, §1(1) (Eng., Wales, Scot., & N. Ir.).

68. CODE PÈNAL [C. PÈN.], art. 450-1 (Fr.).

69. *See* Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng., Wales, & N. Ir.).

70. *See* MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 212, 215-16, 219 (9th ed. 2007); CODE PÈNAL [C. PÈN.], art. 121-4 TO 121-7(Fr.); Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Reichsgesetzblatt [RGBl] 127 § 26, *available at* http://www.legislationline.org/upload/legislations/56/6f/b7295280cbb8cf24d08caa065790.pdf.

71. Genocide Convention case, *supra* note 1, ¶ 417.

72. *Id.* ¶ 180.

73. *Id.*

74. *Id.* ¶ 419..

> [T]he quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS [Bosnian Serb], beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.[75]

But the offence also requires a mental element, in this case, at a minimum, "knowledge of the circumstances of the internationally wrongful act" by an organ, de jure or de facto of the Serbian state.[76] "Knowledge of the circumstances" in this case meant knowledge of the *genocidal intention* of the perpetrators.[77] A suspicion would be inadequate; knowledge of mass killings would be inadequate. Only supply of the material support, while "clearly aware" that "not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such" would suffice.[78] This was not proven "beyond any doubt" [*sic*].[79]

F. Preventing and punishing genocide

Under the Court's vision of state responsibility, Serbia was thus found not to be responsible for the genocide, or for assisting with it in any way. Those who were responsible were not to be considered agents of Serbia; the organs of Serbia, to the extent they were involved, were not considered to have the mens rea for genocide, or at least, it was not so proven beyond reasonable doubt.[80]

But the Convention also mandates positive duties on states to prevent genocide and to punish individual perpetrators.[81] The Court decided that both of these duties had been violated by the Serbian authorities.[82]

The Court carefully distinguished the duty to prevent genocide from complicity on both material and mental aspects. The material aspect of complicity requires positive action; whereas responsibility to prevent genocide can be engaged by omission.[83] Further, complicity requires a proven knowledge of the genocidal intentions and actions of the primary perpetrators; the obligation to prevent can be breached if the state knows only of a "serious danger that acts of genocide would be committed."[84]

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75. *Id.* ¶ 422. *See also id.* ¶ 241.
76. *Id.* ¶ 420.
77. *Id.* ¶ 421.
78. *Id.* ¶ 422.
79. *Id.*
80. *Id.*
81. Genocide Convention, *supra* note 17, art. 1.
82. Genocide Convention case, *supra* note 1, ¶¶ 425-50.
83. *Id.* ¶ 432.
84. *Id.*

Positive assistance, in the form of substantial military and financial aid, had already been established;[85] thus, the Court was not required to address in depth the question of what particular positive duties might be entailed by the Convention to prevent genocide. Responsibility pivoted on the degree of knowledge of Serbian organs of the risk of genocide.[86]

The evidence included the two provisional Orders of the Court from 1993 requiring that Serbia ensure that

> military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide.[87]

This is clearly a much wider category than those over whom Serbia exercises "effective control."[88] The Court also recognized Serbia's "position of influence" over the Bosnian Serbs involved at Srebrenica, relying on the Secretary-General's report to the General Assembly *The Fall of Srebrenica* and evidence that lead the ICTY to determine that "it must have been clear that there was a serious risk of genocide in Srebrenica."[89] The failure to intervene, and indeed the continued support offered, given this degree of knowledge, demonstrated a violation of the obligation under the Genocide Convention to prevent genocide.[90]

The Court in so deciding also managed to characterize Serbia as a special case because of its relationship with the Bosnian Serbs, avoiding broader questions of the duty to prevent genocide by other state parties to the Genocide Convention.[91]

The duty to prevent is an obligation of conduct, not an obligation of result (*obligation de comportement et non de résultat*).[92] An obligation of conduct

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85. *Id.* ¶ 422.

86. *Id.* ¶¶ 434-38.

87. *Id.* ¶ 435.

88. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Request for the Indication of Provisional Measures, 1993 I.C.J. 3, 24 (Apr. 8). *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Serb. & Mont.), Further Requests for Provisional Measures, 1993 I.C.J. 325, 349-50 (Sept. 13); Genocide Convention case, *supra* note 1, ¶ 435. Serbia was found separately to have breached these orders. Genocide Convention case, *supra* note 1, ¶¶ 453-56.

89. Genocide Convention case, *supra* note 1, ¶¶ 434-38. *See* The Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶¶ 494-97, at 106-07, *delivered to the General Assembly*, U.N. Doc. A/54/549 (Nov. 15, 1999).

90. Genocide Convention case, *supra* note 1, ¶ 438.

91. *See id.* ¶¶ 429-30. On the rights and duties of humanitarian intervention more broadly, *see* International Commission on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, ¶¶ 3.1-3.41 (2001).

92. Genocide Convention case, *supra* note 1, ¶ 430. The French text is here included to distinguish the French concept of *obligation de moyens*. On the potential for confusion, *see* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999). The distinction was dropped from the text of the second reading but is still important, *see* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY:

requires the state to take particular steps *regardless* of whether or not they would have been likely to achieve a particular outcome.[93] Ultimately, the Court does not find it proven to a "sufficient degree of certainty" that even had Serbia intervened to attempt to prevent the genocide, it would have been successful.[94] Serbia acted wrongfully, but causation is insufficiently proven to award any material remedy.[95]

The Genocide Convention finally requires states to ensure the punishment of genocide, either through domestic tribunals or at an "international penal tribunal."[96] Since the genocide was committed outside of Serbia, there was no duty to try suspects in its domestic courts.[97] However, given the establishment of the ICTY as a suitable "international penal tribunal" Serbian cooperation was required but lacking.[98]

The positive obligations to prevent and punish genocide are subject to the standard of due diligence.[99] The exact requirements of due diligence vary according to the primary rules at stake, but in all cases it is a standard of international law – the degree of care a state takes in its own domestic affairs is not a relevant factor.[100] The degree of care to be exercised also varies depending on the primary obligation. Pisillo-Mazzeschi explains that in some cases, the standard will be that of a "civilised" or "well-organized" state but in others, performance must be excellent, such as in the care of foreign dignitaries.[101]

Responsibility for breach of positive obligations does not depend on fault attributable to any particular state organ, but is rather an objective standard, which must be based on the actions and omissions of the state taken as a whole.[102] To the extent that positive obligations are breached, there is no need to identify a state organ or agent of the state to be held accountable.[103] The point is not that some organ or agent has *acted* in such a way as to violate international law, but rather that *no* organ or agent has acted, when one ought to have done so. It need not be the case that some particular organ can be considered at fault; the fault might even be that there is no appropriate organ when there ought to be.[104] Pisillo-Mazzeschi explains:

INTRODUCTION, TEXT AND COMMENTARIES 21 (2002).

93. Genocide Convention case, *supra* note 1, ¶ 430.

94. *Id.* ¶ 462.

95. *Id.* ¶¶ 460-62.

96. Genocide Convention, *supra* note 17, art. 6.

97. Genocide Convention case, *supra* note 1, ¶ 442.

98. *Id.* ¶¶ 445-49.

99. *Id.* ¶ 430.

100. *Id.* ¶ 429; *see also* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States,* 35 GERMAN YB INT'L L. 9, 41-42 (1992).

101. Pisillo-Mazzeschi, *supra* note 100, at 44-45; *see also* Genocide Convention case, *supra* note 1, ¶¶ 429-30.

102. Genocide Convention case, *supra* note 1, ¶ 179.

103. *Id.* ¶ 182.

104. Pisillo-Mazzeschi, *supra* note 100, at 26.

> The practice, in fact, clearly indicates that it is enough to have, for purposes of responsibility, a general insufficiency of "governmental action" or a general lack of diligence on the part of the State authorities considered as a whole, as regards the international standard; and that it is not necessary instead to carry out an investigation to establish each time the subjective fault of the single individuals acting as State organs.[105]

G. Who is the State? Entrenching Nicaragua

The Court has thus given the *Nicaragua* test of state responsibility fresh impetus 20 years after it originally formulated the same. States bear responsibility only for the actions of their de jure organs, de facto organs by virtue of complete dependence or agents by virtue of effective control in individual operations. A veneer of independence will continue to shield states from responsibility for the actions of those who do not display governmental insignia.[106]

Positive obligations to prevent and punish genocide are recognized, subject to the due diligence standard. It is an obligation that falls on the state machinery. However, even where due diligence is manifestly lacking, such as in the present case, in the absence of a clear causal link to any resulting harm (*dommage*), i.e. absence of undisputable evidence that intervention would have successfully prevented the harm, there will be no remedy beyond the metaphorical slap on the wrist.[107]

III. THE UNITED NATIONS SECURITY COUNCIL AND STATE RESPONSIBILITY FOR TERRORISM

A. Terrorism in International Law

The attacks on 11th September 2001 on the United States created an international shockwave by virtue of the scale of destruction and death, the lack of prior warning and the targeting of civilians of the professional classes. The response of the international community was unprecedented as United Nations organs and states, including states with which the United States had antagonistic relations, immediately expressed their sympathies.[108] The Security Council, on the

105. *Id.* at 43. On fault and its role in some, but not all primary rules, *see* CRAWFORD, *supra* note 92, at 13.

106. In the context of the Iran-U.S. Claims Tribunal, David Caron has suggested that this creates a kind of "fortuity of proof" as responsibility depends on being able to establish that, inter alia, he "wore a Revolutionary Guards' armband." Caron, *supra* note 10, at 109, 151.

107. Genocide Convention case, *supra* note 1, ¶ 463.

108. G.A. Res. 56/1, ¶ 2, U.N. GAOR, 56th Sess., U.N. Doc. A/Res/56/1 (Sept. 12, 2001); S.C. Res. 1368, ¶¶ 1-6, U.N. Doc. S/RES/1368 (Sept. 12, 2001). As well as predictable allies such as Israel and the United Kingdom, the leaders of states that had perhaps less than friendly relations with the United States, such as Cuba, Iran, Syria and the Taleban in Afghanistan also expressed their disapproval and sympathies. Only the Iraqi administration openly celebrated. U.N. GAOR, 56th Sess., 13th plen. mtg. at 14, U.N. Doc. A/56/PV.13 (Oct. 1, 2001); U.N. GAOR, 56th Sess., 15th plen. mtg., at 5, U.N. Doc. A/56/PV.15 (Oct. 2, 2001); U.N. GAOR, 56th Sess., 16th plen. mtg. at 17, U.N. Doc. A/56/PV.16 (Oct. 3, 2001); Susan Hall, Suzanne Goldenberg & John Hooper, *Palestinian Joy, Global Condemnation,* THE GUARDIAN, Sept. 12, 2001; Suzanne Goldenberg, Rory McCarthy & Brian

suggestion of the French President, forewent the conventional show of hands to pass their resolution in favor of voting "by standing, in a show of unity in the face of the scourge of terrorism."[109]

To the rest of the world and the Council, indeed even to the United States, terrorism was not a new threat, even if the attacks on September the 11th demonstrated a degree of organization and destruction that seemed to reach a new level. Beginning with the Convention on Offences and Certain Other Acts Committed on Board Aircraft in 1963 there are now no less than thirteen United Nations Conventions and Protocols on terrorism, twelve of which preceded 2001.[110]

Despite this glut of treaty law, terrorism has yet to be unequivocally defined, and as long as the conventions each focus on distinct manifestations, such as hijacking,[111] bombings,[112] hostage taking,[113] proliferation and use of nuclear

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Whitaker, *Iraq stands alone as Arab world offers sympathy and regrets,* THE GUARDIAN, Sept. 13, 2001.

109. U.N. SCOR, 56th Sess., 4370th mtg. at 8, U.N. Doc. S/PV.4370 (Sept. 12, 2001).

110. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Aircraft Convention 1963]; Convention for the Suppression of Unlawful Seizures of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Seizures of Aircraft Convention 1970]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Civil Aviation Convention 1971]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Diplomatic Agents Convention 1973]; International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456, 1316 U.N.T.S. 205 [hereinafter Hostages Convention 1979]; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101 [hereinafter Protection of Nuclear Material Convention 1980]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627 [hereinafter Unlawful Acts of Violence Protocol 1988]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668, 1678 U.N.T.S. 221 [hereinafter Maritime Navigation Convention 1988]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685, 1678 U.N.T.S. 304 [hereinafter Continental Shelf Protocol 1988]; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721 (1991) [hereinafter Plastic Explosives Convention 1991]; International Convention for the Suppression of Terrorist Bombings, Dec. 17, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 256 (1998) [hereinafter Terrorist Bombings Convention 1988]; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) [hereinafter Terrorism Financing Convention 1999]; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 44 I.L.M. 815 (2005) [hereinafter Nuclear Terrorism Convention 2005].

111. Aircraft Convention 1963, *supra* note 110; Seizures of Aircraft Convention 1970, *supra* note 110; Maritime Navigation Convention 1988, *supra* note 110; Continental Shelf Protocol 1988, *supra* note 110.

112. Civil Aviation Convention 1971, *supra* note 110; Terrorist Bombings Convention 1997, *supra* note 110; Continental Shelf Protocol 1988, *supra* note 110; Plastic Explosives Convention 1991, *supra* note 110; Unlawful Acts of Violence Protocol 1988, *supra* note 110; Maritime Navigation Convention 1988, *supra* note 110.

113. Diplomatic Agents Convention 1973, *supra* note 110; Hostages Convention 1979, *supra* note 110.

material,[114] and financing,[115] states can avoid the thorny matter of affirming a comprehensive definition that might tie their hands at a later stage. The closest defintion is found in Article 2 of the International Convention for the Suppression of the Financing of Terrorism, which suggests that terrorism is defined as (a) anything covered by 9 other conventions and protocols[116] or

> (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[117]

Notwithstanding copious resolutions on terrorism, the Security Council has never promulgated a definition, instead referring to the same "international conventions and protocols relating to terrorism."[118] Ambassador Greenstock, as Chair of the Council Counter-Terrorism Committee (CTC) solved the problem of definition as follows: "[f]or the Committee, terrorism is what the members of the Committee decide unanimously is terrorism."[119] To crudely paraphrase: "terrorism is what we say it is."

Fortunately, it is not crucial for the purposes of this paper that the present author provide the definition that every state can agree upon; one that has to date eluded 192 members of the United Nations and tens of thousands of scholars of international law. Since the rules of state responsibility are, according to the ILC, matters of secondary rules, it should not be necessary, for their examination, to provide a precise and conclusive definition of the primary rules to which they attach.[120]

B. The Council's Counter-Terrorism Resolutions and State Responsibility

The authority of the Council and the status of its resolutions vis á vis other sources of international law has been extensively debated, with a particular flurry

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114. Protection of Nuclear Material Convention 1980, *supra* note 110; Nuclear Terrorism Convention 2005, *supra* note 110.

115. Terrorism Financing Convention 1999, *supra* note 110.

116. *Id.* art. 2, annex. Excluded are the Aircraft Convention 1963, *supra* note 110; Plastic Explosives Convention 1991, *supra* note 110; Nuclear Terrorism Convention 2005, *supra* note 110.

117. Terrorism Financing Convention 1999, *supra* note 110, art 2. For a review of various definitions to be found in international instruments and their strengths and weaknesses, see HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW 20-29 (2005); *see also* Antonio Cassese, *Terrorism as an International Crime, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213, 214, 219 (Andrea Bianchi ed., 2004).

118. *E.g.*, S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 1982).

119. Andrew Clapham, *Terrorism, National Measures and International Supervision, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 117, at 283, 296-97.

120. On the distinction between primary and secondary rules, see Robert Ago, *Second Report on State Responsibility: The Origin of International Responsibility*, ¶ 7, *delivered to the International Law Commission*, U.N. Doc. A/CN.4/233, *reprinted in* [1970] 2 Y.B. Int'l L. Comm'n 177, 178, U.N. Doc. A/CN.4/SER.A/1970/Add.1 [hereinafter Ago: Second Report 1970]; *see also infra* text accompanying notes 384-90.

of literature discussing the anti-terrorism resolutions that followed the attacks of 2001.[121] The debate need not detain us here and for the purposes of this article, it shall be assumed that the Council's counter-terrorism resolutions, taken under Chapter VII, are binding on all United Nations member states.[122] The delicate matter of respect for customary international law and the principles and purposes of the Charter need not be further discussed as it is not necessary in order to evaluate the Council's vision of state responsibility per se.[123] Indeed this must be one of few articles to examine Council anti-terrorism measures and international human rights law without investigating the potential for tensions between the two.[124]

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121. *See generally* Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002) (discussing Resolution 1370 as a possible harbinger of the Security Council's willingness to take on a more commanding legislative role); José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003) (focusing on the negative aspects of the Security Council's recent legislative actions in three areas of international law); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003) (positing that the Security Council, in passing Resolution 1373, acted beyond the scope of its designated authority); Roberto Lavalle, *A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540*, 51 NETH. INT'L L. REV. 411 (2004) (comparing the legislative qualities of Resolution 1540 against its legislative predecessor, Resolution 1373); Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537 (2004) (discussing the impact of the Council's Resolutions on the role of states as the major source of protection against terrorism); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005) (arguing that the Council's legislative resolutions are innovative, within the ambit of the U.N. Charter's grant of power to the Security Council, and they are necessary tools to combat modern terrorism); TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 7-14 (2005) (discussing broadly the legal bases for Security Council resolutions and the extent of their authority); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881 (2006) (evaluating the correlation between the perceived legitimacy of the measures and the extent to which states have implemented them). For a pre-2001 review of the "law-making" authority of the Council, see Gaetano Arangio-Ruiz, *On the Security Council's "Law-Making"*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 609 (2000).

122. On the legal force of the resolutions, see U.N. Charter arts. 24-25, 103; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 53-54 (June 21) [hereinafter Namibia Advisory Opinion]; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Request for the Indication of Provisional Measures, 1992 I.C.J. 114, 126 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Request for the Indication of Provisional Measures, 1992 I.C.J. 3, 14-15 (Apr. 14); GAZZINI, *supra* note 121, at 14; PETER J. VAN KRIEKEN, TERRORISM AND THE INTERNATIONAL LEGAL ORDER 111-12 (2002); Happold, *supra* note 121, at 597; Rosand, *supra* note 121, at 574. For arguments that the legal force of the Resolutions has been improperly expanded, see Namibia Advisory Opinion, *supra*, at 291-95, 339-40 (dissenting opinions of Judge Fitzmaurice and Judge Gros); Arangio-Ruiz, *supra* note 121, at 708-11.

123. *See* U.N. Charter, art. 24, ¶ 2; E.J. Flynn, *The Security Council's Counter-Terrorism Committee and Human Rights*, 7 HUM. RTS. L. REV. 371, 374-76 (2007) (referencing adherence to human rights norms as one of the principles and purposes of the Charter that reinforces the strength of anti-terrorism resolutions). *See generally* Rosemary Foot, *The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas*, 29 HUM. RTS. Q. 489 (2007).

124. For a recent examination of this topic, *see generally* SECURITY AND HUMAN RIGHTS

The distinct issues of state responsibility for terrorist attacks and the right to use self-defense against such attacks ought not to be conflated.[125] The legality of intervention in Afghanistan following the attacks of September 11th should not be confused with the matter of whether Afghanistan is "responsible" for those attacks.[126]

One can envisage circumstances were state responsibility is not in question (for example, de jure state agents have committed a "terrorist-like" attack), but the right to use of force in self-defense does not automatically follow. There is no right to resort to force, for example, if the gravity of the attack is not sufficiently serious to reach the threshold of an "armed attack."[127] Further, there will be no legitimate self-defense in the absence of an ongoing imminent threat of further attacks.[128] Further, even in simple cases of self-defense against an armed attack by one state against another, the limitations of proportionality and necessity remain crucial.[129] A no-holds-barred saturation bombing campaign would be unlikely to meet the tests of necessity and proportionality and thus be illegal. Simply put, a "terrorist" attack, *even by a state,* does not provide carte blanche for all and any measures of self-defense.

On the other hand, there is considerable debate about whether state responsibility is a pre-requisite for the legality of self-defense measures against purported terrorists residing in another state's territory (a host state). There is no textual reason to suggest that an "armed attack" in the sense of Article 51 must be by a state. On the other hand, state practice and opinio juris, particularly prior to the September 11th attacks, point to the opinion that state responsibility is a pre-requisite for the legality of any incursion on the territory of the sovereign host state. The arguments for and against each view will not be repeated here.[130]

(Benjamin J. Goold & Liora Lazarus eds., 2007) (containing a collection of essays scrutinizing the relationship between security and human rights from a multidisciplinary perspective). *See also* Bianchi, *supra* note 121, at 885-87, 905-14.

125. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 375 (1963).

126. *See* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* 12 EUR. J. INT'L L. 993, 999 (2001).

127. Nicaragua, *supra* note 2, at 103-04.

128. Armed "reprisals" are precluded; *see* Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, para. 6 (1st princ.), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]. Gazzini provides examples of measures that appear like reprisals in the counter-terrorism context. However, in these cases, the states all claim some other legal justification for their action, and thus there is no opinio juris to support a change in customary international law. *See* GAZZINI, *supra* note 121, at 203-04; *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 163-64 (2d ed. 2004).

129. Carsten Stahn, *Security Council Resolution 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say,* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES 13-16 (Oct. 12, 2001), http://66.102.1.104/scholar?hl=en&lr=&q=cache:GEsWRgr99D4J:www.ejil.org/forum_WTC/ny-stahn.pdf+Carsten+Stahn+AND+Security+Council+Resolution+1368+(2001)+and+1373+(2001):+What+They+Say+and+What+They+Do+Not+Say (last visited Sept. 21, 2008). *See also* GAZZINI, *supra* note 121, at 192-94; GRAY, *supra* note 128, at 167.

130. For an excellent and concise discussion of the competing arguments with evidence of customary international law and commentators in support of each, see TAL BECKER, TERRORISM AND

The Council did nothing to help clarify the matter in its hastily agreed Resolution 1368 of September 12th 2001.[131] Whilst in the preamble "recognizing the inherent right of individual or collective self-defense in accordance with the Charter," nowhere do they use the term "armed attack" which, "in accordance with the Charter," is an essential prerequisite to self-defense.[132] The terrorist attacks of September 11th are instead "regard[ed]...like any act of international terrorism, as a threat to international peace and security."[133] Threats to international peace and security, of course, justify invocation of Chapter VII powers, even to the extent of using force in the absence of any actual or purported violation of international *law* by the target state.[134] They do not automatically authorize the use of force absent Security Council approval; under the Charter, only an "armed attack" can.[135]

THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 158-62 (2006). Those maintaining the view that state responsibility is a sine qua non for the legality of the use of force in self-defense include Cassese, *supra* note 126, at 996-97; Giorgio Gaja, *In What Sense was There an "Armed Attack"?* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, *at* http://www.ejil.org/forum_WTC/ny-gaja.html (visited Aug. 7, 2007); Pierre-Marie Dupuy, *The Law After the Destruction of the Twin Towers,* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, *at* http://www.ejil.org/forum_WTC/ny-dupuy.html (visited Aug. 23, 2007). *See generally* Greg Travalio & John Altenburg, *Terrorism, State Responsibility and the Use of Military Force*, 4 CHI. J. INT'L L. 97 (2003); Iain Scobbie, *Words my Mother Never Taught Me--"In Defense of the International Court,"* 99 AM. J. INT'L L. 76 (2005). They find support in, inter alia, Nicaragua, *supra* note 2; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter Palestinian Wall opinion]. Arguing for the right to use force in self-defense against terrorists regardless of state responsibility are BROWNLIE, *supra* note 125, at 375; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense,* 99 AM. J. INT'L L. 52, 58 (2005). These authors defend their argument with references to, inter alia, recent practice of the Council, the North Atlantic Treaty Organization, the Organization of American States, and opinio juris in support of Israel following the Palestinian Wall opinion. *See also* BECKER, *supra*, at 159-62; GRAY, *supra* note 128, at 159. Gazzini takes the view that prior to September 11th, the former view prevailed. Since then, the real issue has become, not the legality of self-defense against non-state terrorist actors per se, but the restrictions and conditions to be placed on the exercise of self-defense once a state has determined to pursue such a course. *See* GAZZINI, *supra* note 121, at 139, 190-97. Gray agrees that prior to September 11th use of force in self-defense was only justified to the extent that the host state was responsible. However, she does not consider there to be enough evidence to decide that customary international law has since evolved to definitively allow self-defense against actors whose actions are disconnected from the state in which they reside. *See* GRAY, *supra* note 128, at 164-67; *see also* Christine Gray, *The Use of Force and the International Legal Order*, *in* INTERNATIONAL LAW 589, 602-03 (Malcolm D. Evans ed., 2d ed. 2006).

131. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

132. *See id. See also* U.N. Charter art. 51; Derek Jinks, *State Responsibility for the Acts of Private Armed Groups,* 4 CHI. J. INT'L L. 83, 85 n.8 (noting that in previous Resolutions, the Council has explicitly referred to an "armed attack" when invoking the right of self-defense).

133. S. C. Res. 1368, *supra* note 131, ¶ 1.

134. GAZZINI, *supra* note 121, at 7-8; Arangio-Ruiz, *supra* note 121, at 632.

135. U.N. Charter art. 51; *but see* GAZZINI, *supra* note 121, at 123-24 (arguing that there is a new, post-Charter customary law on the use of force with a threshold for self-defense below that of an armed attack).

Acts of terrorism had been recognized as potential threats to international peace and security and triggering Chapter VII powers in previous resolutions on terrorism, with reference to Libya, Sudan and Afghanistan.[136] However, none of these made reference to self-defense. At best, Chapter VI Res. 731 on Libya affirms a state's right "to protect their nationals from acts of international terrorism that constitute threats to international peace and security."[137]

The Council recognized in Resolution 748 the Charter preclusion of the threat or use of force which indicates that: "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force."[138]

Any state assisting terrorists or "acquiescing" to terrorist activities will hence be in violation of Article 2(4).[139] But in Resolution 1368 the Security Council seems to go further and "[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable."[140]

"Those responsible" appears in the French text as the rather less concise "*ceux que portent la responsabilité*" with "held accountable" appearing as "*rendre des comptes*".[141] There is a hint of tautology in Resolution 1368's insistence that "those responsible [for aiding, supporting or harboring terrorists]...will be held accountable." It is not specified for what exactly harboring states shall be held accountable – whether solely for their actions in harboring the terrorists or whether for any resulting terrorist attacks. The latter would leave them open, should a terrorist attack reach the threshold of an "armed attack," to lawful use of force in self-defense against their own institutions. Furthermore, the use of "those" is broad enough to be interpreted as referring to non-state actors who shall be held accountable by states in domestic judicial process. At the time this Resolution was passed, it should be recalled that it was far from clear who was behind the attacks.

The Council, in the heat of September 12th, also "[e]xpresse[d] its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001,

136. S.C. Res. 748, pmbl., U.N. Doc. S/RES/748 (Mar. 31, 1992); S.C. Res. 1054, pmbl. paras. 8-11, U.N. Doc. S/RES/1054 (Apr. 26, 1996); S.C. Res. 1070, pmbl. paras. 7,10, ¶ 12, U.N. Doc. S/RES/1070 (Aug. 16, 1996); S.C. Res. 1267, pmbl., ¶ 1, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, pmbl., ¶ 1, U.N. Doc. S/RES/1333 (Dec. 19, 2000); *see also* Chapter VI resolutions including S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992); S.C. Res. 1044, U.N. Doc. S/RES/1044 (Jan. 31, 1996); S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

137. S.C. Res. 731, *supra* note 136, pmbl. para. 2.

138. S.C. Res. 748, *supra* note 136, pmbl. para. 6. *See also* U.N. Charter art. 2, para. 4; Friendly Relations Declaration, *supra* note 128, para. 6 (1st princ.); Corfu Channel, *supra* note 24, at 22; Nicaragua case, *supra* note 2, ¶ 195, at 104.

139. U.N. Charter art. 2, para. 4.

140. S.C. Res. 1368, *supra* note 131, ¶ 3.

141. Résolution du Conseil de sécurité 1368, ¶ 3, Nations Unies Document S/RES/1368 (12 Septembre 2001), *available at* http://www.un.org/french/ga/search/view_doc.asp?symbol=S/RES/1368 (2001).

and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."[142]

"All necessary steps" is well known code for the use of force. However, with a little over two weeks to allow the initial shock to subside and during which to bear witness to the US-led coalition's preparations for war in Afghanistan, the Council in Resolution 1373 demonstrates a little less "readiness" to take its own measures.[143] The preamble reaffirms "the need to combat by all means...in accordance with the Charter" international terrorism, but the Council stops short of indicating that *it* is willing to take all necessary steps to that end. It is, however, prepared to take "all necessary steps" to ensure compliance with the Resolution, a quite extraordinary statement given the extensive demands on all United Nations member states contained within.[144]

The "inherent right of individual or collective self-defence" is again alluded to in the preamble of the Resolution, but no explicit authorization is given for the attacks that followed against Afghanistan, even though by this time they were a foregone conclusion.[145] Nowhere does the term "armed attack" appear, as had been the case in other resolutions authorizing the use of force, nor is Afghanistan named as an appropriate target.[146] It certainly does not preclude the use of force by the US and its allies and, of course, such a thing would have been unthinkable given the veto powers of the United States and its loyal ally, the United Kingdom. The ambiguity can be explained in at least two ways: on the one hand, it may be that some states were uncomfortable with the implications for the rules of attribution and state responsibility of giving the terrorist attacks the status of "armed attacks" and indicating Afghan responsibility for the same.[147] On the other hand, and at least as probable, is that the United States and its allies on the Council did not wish to be limited in their response to *only* Afghanistan. Should it transpire that other states were engaged in some way in the attacks or were planning or sheltering the planners of future attacks, the coalition would not have to obtain further Council authorization for action against those states. In any case, the verbatim record is manifestly unhelpful as the meeting lasted an astonishing five minutes, with time only for the unanimous vote and no state remarks.[148] Whatever discussions were held between the Council members were held off-the-record.

Resolution 1373 has been described as "legislative" and indeed, it demonstrates features normally associated with legislation.[149] Most significantly,

142. S.C. Res. 1368, *supra* note 131, ¶ 5.

143. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

144. *Id.* ¶ 8.

145. *Id.* pmbl. para. 4.

146. *See* Jinks, *supra* note 132, at 85 n.8.

147. *See* Stahn, *supra* note 129, at 4-8.

148. U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/PV.4385 (Sept. 28, 2001).

149. *E.g.*, Szasz, *supra* note 121, at 905; Alvarez, *supra* note 121, at 874; Happold, *supra* note 121, at 595; Lavalle, *supra* note 121, at 414-15; Rosand, *supra* note 121, at 552. *See also* Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334 (2003).

it is addressed to every member state of the United Nations and concerns itself with a whole genre of behavior, rather than a specifically identified threat. It is thus a general prescription of conduct to all member states, rather than a specifically targeted executive order directed to a particularly mischievous state that is thought to pose a threat to international peace and security. Further, it is without limit of time.

In its generality it thus differs significantly from the pre-September 2001 efforts to deter the Taliban, the purported but largely unrecognized Government of Afghanistan, from "sheltering and training" terrorists.[150] The Council had instituted sanctions against the regime, monitored by a dedicated committee (commonly known as the 1267 committee), to try to bring pressure on the Taliban to extradite Usama Bin Laden.[151] Resolution 1267 and its follow-ups place obligations on all member states to respect the sanctions, but they are aimed at a specific threat, a specific manifestation of terrorism, not terrorism in general.[152] By contrast, Resolution 1269 is directed against terrorism more generally, but, taken under Chapter VI, it contains only recommendations, not binding obligations.[153]

The operative paragraphs of Resolution 1373 introduce a number of obligations for states and create the Counter-Terrorism Committee (CTC) consisting of one representative of each Council member to monitor compliance.[154] The Council "[d]*ecides* that states shall" prevent the funding of terrorism by criminalizing provision or collection of funds, freezing existing funds and prohibiting the donation of funds.[155] Further, "all states shall" refrain from giving any support, "active or passive," to terrorist groups; suppress recruitment and arms transfers to terrorists;[156] share information, including giving "early warnings" to other states; "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens"; prevent the same from operating in their territories; ensure adequate criminal law and its application against terrorists, their financiers and supporters; cooperate in exchange of intelligence to this end; and prevent their free movement.[157]

States are requested ("call[ed] upon") to exchange pertinent information, to cooperate in matters of criminal justice, to ensure that asylum systems are not abused by participants in terrorism and to ratify pertinent Conventions, in particular, the Terrorism Financing Convention.[158] The Council "[n]*otes* with concern" connections between international terrorism and other international

150. S.C. Res. 1267, *supra* note 136, pmbl. para. 6.

151. *Id.* ¶ 6.

152. S.C. Res. 1333, *supra* note 136, pmbl. paras. 10-14; S.C. Res. 1377, pmbl., U.N. Doc. S/RES/1377 (Nov. 12, 2001).

153. S.C. Res. 1269, *supra* note 136.

154. S.C. Res. 1373, *supra* note 143, ¶ 6.

155. *Id.* ¶ 1.

156. *Compare* Friendly Relations Declaration, *supra* note 128, para. 6 (1st princ.).

157. S.C. Res. 1373, *supra* note 143, ¶ 2.

158. *Id.* ¶ 3; *see* Terrorism Financing Convention 1999, *supra* note 110.

crimes, such as illegal trafficking in drugs, arms and nuclear material (though not persons), and money laundering, and although emphasizing the need for cooperation, does not actually mandate it.[159]

The subject matter does not differ radically from Resolution 1269 of October 1999, and Peter J. Van Krieken has argued that Resolution 1373 is a natural progression from the earlier resolution, rather than indicative of a change in direction by the Council.[160] However, Resolution 1269 is a non-binding Chapter VI resolution which "calls upon" states to "consider" ratification of anti-terrorism conventions, as well as applying fully those to which they are party.[161] They are asked to take "appropriate steps" to: cooperate with one another to prevent and suppress terrorism, including by limiting preparation and financing of activities; deny "safe haven" and ensure prosecution and extradition of those involved; take "appropriate measures" to limit asylum to terrorists; and exchange information that can help prevent terrorist acts being committed.[162] This is considerably milder than Chapter VII Resolution 1373 by virtue of which the Council "decides" that states "shall" take a number of measures. The suggested measures are given much less detail in the former resolution, allowing states a broader discretion in their implementation as well as a choice as to whether they will implement the recommendations at all.

Resolution 1373's focus on financing of terrorism might have appeared strange had it not been for the earlier International Convention for the Suppression of the Financing of Terrorism.[163] This meant that the Council members had some ready-prepared provisions that could be easily adopted, enabling the Council to act quickly.[164] Nevertheless, in September 2001, that Convention was far from being in force, having as parties only Botswana, Sri Lanka, the United Kingdom and Uzbekistan.[165] Moreover, whilst introducing, indeed mandating, the counter-terrorism provisions of this treaty for *all* member states, despite the fact that only one Council member had ratified it, they also neglected to include the safety-net provisions in the Convention for the benefit of suspects.[166] The "alleged offender" of the Convention loses the presumption, or at least possibility, of innocence to become simply the "person[] involved in terrorist acts" in the Council Resolution.[167]

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159. S.C. Res. 1373, *supra* note 143, ¶ 4.

160. S.C. Res. 1269, *supra* note 136; VAN KRIEKEN, *supra* note 122, at 144.

161. S.C. Res. 1269, *supra* note 136, ¶ 2.

162. *Id.* ¶ 4.

163. Terrorism Financing Convention 1999, *supra* note 110.

164. *Compare id.* art. 2(1), *with* S.C. Res. 1373, *supra* note 143, ¶ 1(b). *Compare id.* art. 8(1), *with* S.C. Res. 1373, *supra* note 143, ¶ 1(c). *Compare id.* art. 14, *with* S.C. Res. 1373, *supra* note 143, ¶ 3(g).

165. James Martin Center for Nonproliferation Studies, *Appendix XII: U. N. Conventions on Terrorism*, INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATIONS AND REGIMES 2002, at 358-63 (Nov. 19, 2007), http://cns.miis.edu/inventory/pdfs/apmunter.pdf.

166. Terrorism Financing Convention 1999, *supra* note 110, arts. 9(3)-(6), 17; *see also* Bianchi, *supra* note 121, at 914-15; Alvarez, *supra* note 121, at 875-78.

167. *Compare* Terrorism Financing Convention 1999, *supra* note 110, art. 3, *with* S.C. Res. 1373,

Lavalle reminds us that whatever the contents and authority of the norms of Council 1373, it is not a treaty and, therefore, the customary law of treaty interpretation, including the Vienna Convention, does not apply.[168]

The overwhelming majority of states, perhaps apprehensive from events earlier that month, silently accepted the Resolution. Compliance, at least formally, has since been extraordinary, with every United Nations member state submitting the requisite initial report (an achievement that must be greatly envied by the human rights treaty bodies) and scrambling to ratify the relevant treaties.[169] Cuba was a rare voice at the General Assembly expressing concern about the constitutional implications of the Council's "lawmaking:"

> The Security Council has been pushed to give its legal support to the hegemonic and arbitrary decisions of the dominant Power. Those decisions violate the Charter and international law and encroach upon the sovereignty of all States. In this, the Council is once again usurping the functions of the General Assembly, which is the only organ whose universal membership and democratic format could legitimize such far-reaching decisions. The Council uses the unusual method of imposing on all States some of the provisions found in the conventions against terrorism, to which individual States have the right to decide whether or not they wish to be signatories.[170]

Resolution 1373 introduces for all states obligations of conduct rather than obligations of result.[171] States are required to take certain, quite specific measures. If they fail to do so, they will be responsible for their failure; to the extent that the Council even threatens to take "all necessary steps" against them.[172] If a state should take these measures and some funds still reach terrorists within its jurisdiction, the state will have satisfied the requirements of due diligence and will not engage responsibility as it will not have committed any "wrongful act."[173] On

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supra note 143, ¶ 2(a). The CTC, having early on declared that human rights concerns were outside its mandate, later proved more cooperative, and the Council introduced requirements that counter-terrorism measures be respectful of human rights and humanitarian law in later resolutions. *E.g.*, S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1624, ¶ 4, U.N. Doc. S/RES/1624 (Sept. 14, 2005). At the end of 2006, a system was introduced for delisting innocent persons from the sanctions regime of the 1267 Committee. S.C. Res. 1735, ¶¶ 13-14, U.N. Doc. S/RES/1735 (Dec. 22, 2006). *See also* BECKER, *supra* note 130, at 127-29. For a review of the CTC's engagement with human rights, *see* Flynn, *supra* note 123.

168. Lavalle, *supra* note 121, at 418.

169. David Cortright, A Critical Evaluation of the U.N. Counter-Terrorism Program: Accomplishments and Challenges 5-6, http://www.tni.org/crime-docs/cortright.pdf (last visited Sept. 20, 2008); *see* U.N. Secretariat, Office of the High Comm'r for Human Rights, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, at 19, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006).

170. U.N. GAOR, 56th Sess., 13th plen. mtg. at 16, U.N. Doc. A/56/PV.13 (Oct. 1, 2001) (speech by Mr. Rodríguez Parrilla of Cuba).

171. *See supra* text accompanying note 92.

172. S.C. Res. 1373, *supra* note 143, ¶ 8.

173. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188, ¶ 430, at 294-95 (Feb. 26, 2007)

the other hand, if a state fails to take these measures, even if no terrorist funding occurs, it will still technically be in breach of the obligation. Responsibility does not depend on actual terrorist financing, let alone any act of terrorism.[174]

The ministerial level meeting of the 12th of November 2001, resulting in Resolution 1377, reinforced the obligations of Resolution 1373.[175] It also empowered the CTC to consider ways to assist states in complying with the earlier resolution.[176] A number of resolutions follow relating to the 1267 sanctions regime, variously extending the sanctions to be applied, reporting requirements to the 1267 committee, and improving cooperation with the CTC.[177] Sanctions are modestly eased in Resolution 1452 with regard to basic necessities and to pay debts.[178] In January 2003, states, whilst reminded of their obligations, including reporting obligations, are also advised to ensure compliance with international law, including human rights.[179] Under pressure from some European states, a system for "delisting" innocent persons from the sanctions regime of 1267 was finally introduced in December 2006.[180]

The Madrid bombings in 2004 were followed by the disastrous Resolution 1530 which, under pressure from the Spanish Government, explicitly attributed blame to ETA, despite a paucity of evidence indicating their involvement.[181] The mistake was not repeated after the London bombings 16 months later.[182]

The CTC was restructured and strengthened by Resolution 1535 and this move was followed by another "legislative" effort of the Council in Resolution 1540, this time introducing obligations on states to deny assistance to any non-state actors attempting to develop or otherwise obtain biological, chemical or nuclear weapons.[183] States are also required to review and, if necessary, amend or enforce their domestic laws to prevent non-state actors handling such weapons.[184] Non-proliferation measures must be increased (also, it would appear, in respect of states) regardless of member states' ratification of or accession to relevant non-

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[hereinafter Genocide Convention case].

174. *See* Ago: Second Report 1970, *supra* note 120, at 194-95. Damage will be relevant to the availability of remedies, in particular, in identifying an "injured state" in light of ILC Articles 42 and 48. ILC Articles, *supra* note 4, arts. 42, 48, at 54, 56.

175. S.C. Res. 1377, *supra* note 152.

176. *Id.* annex paras. 13-15.

177. S.C. Res. 1390, ¶¶ 1 to 2(a)-(c), U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1455, ¶¶ 1, 3-4, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, ¶¶ 1-3, 10, 14-15, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, ¶¶ 1, 15, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1735, *supra* note 167, ¶¶ 1, 29.

178. S.C. Res. 1452, ¶¶ 1-2, U.N. Doc. S/RES/1452 (Dec. 20, 2002).

179. S.C. Res. 1456, *supra* note 167, ¶ 6.

180. S.C. Res. 1735, *supra* note 167, ¶¶ 13-14.

181. S.C. Res. 1530, ¶ 1, U.N. Doc. S/RES/1530 (Mar. 11, 2004); *see also* Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945, 946 (2007).

182. S.C. Res. 1611, U.N. Doc. S/RES/1611 (July 7, 2005).

183. S.C. Res. 1535, ¶¶ 1-3, U.N. Doc. S/RES/1535 (Mar. 26, 2004); S.C. Res. 1540, ¶ 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004); *see also* Lavalle, *supra* note 121, at 416.

184. S.C. Res. 1540, *supra* note 183, ¶ 2.

proliferation treaties.[185] Another committee was established, which will receive mandatory reports from states on compliance.[186] The Council has become a little less belligerent since Resolution 1373 and, rather than "express[ing] its determination to take all necessary steps," this time more modestly "expresses its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end."[187]

This time, the constitutional issues did not go unremarked and a number of states expressed concerns about the propriety of the Council taking this kind of action.[188] Nevertheless, after the fact, they complied.[189]

The CTC is authorized to make state visits, with state consent, in Resolution 1566.[190] This Resolution is also worth considering for its reiteration of the Council's interpretation of state obligations vis à vis terrorism, as it:

> Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.[191]

September 2005 witnessed Resolution 1624's expansion of the counter-terrorism mission to preventing the "glorification of terrorist acts" and, albeit with a nod to human rights, in particular the right of free speech, calls upon states to prohibit and prevent "incitement" to terrorism.[192] States are also called upon to improve passenger screening in international transport.[193] The Council again seeks to establish an international norm for the entire international community, although, by "calling upon" rather than "deciding...that States shall," there is not the same legislative air – the Council is "asking nicely" rather than demanding compliance from states.

C. Who is the State? Counter-terrorism Obligations and Responsibility of States

The Council's counter-terrorism resolutions do not provide an unambiguous view of state responsibility. Not for the first time, precision is a casualty of the veto power. There are, however, at least three possible interpretations that can be drawn from the post-2001 resolutions. The first is uncontroversial; the second, in

185. *Id.* ¶ 3; *but see* U.N. SCOR, 59th Sess., 4956th mtg. at 2-5, U.N. Doc. S/PV.4956 (Apr. 28, 2004) (speech by Mr. Akram of Pakistan regarding the adoption of Security Council Resolution 1540).

186. S.C. Res. 1540, *supra* note 183, ¶ 4.

187. S.C. Res. 1373, *supra* note 143, ¶ 8; S.C. Res. 1540, *supra* note 183, ¶ 11.

188. Lavalle, *supra* note 121, at 426-28.

189. *Id.* at 428.

190. S.C. Res. 1566, *supra* note 118, ¶ 8.

191. *Id.* ¶ 2.

192. S.C. Res. 1624, *supra* note 167, pmbl. paras. 5, 7, ¶ 1.

193. *Id.* ¶ 2.

this author's opinion, engages little controversy; the third is sufficiently controversial to remain unproven.

1. States must refrain from interference with the sovereign affairs of other states, including by supporting, inter alia, terrorist actors

The obligation of states to respect the sovereignty, independence and territorial integrity of one another is a central pillar of international law. This principle can be found in the Charter[194] and in the Friendly Relations Declaration:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[195]

Today, widely accepted as a description of customary international law, the second of these paragraphs was replicated with approval in the Preambles to Council Resolutions 748 and 1373.[196]

According to the classical understanding, the state is thus responsible for providing any assistance or support to terrorists, but not for any resulting terrorists attacks themselves. Responsibility depends on the dependence and control tests of ILC Articles 4 & 8, *Nicaragua,* and now the Genocide Convention case. The international wrong is the positive action of the state in providing support; this may, depending on the circumstances, reach the threshold of "indirect aggression", but it will not constitute an "armed attack." As a negative obligation, i.e. a duty to abstain, due diligence is irrelevant; it is nonsense to talk about doing one's best *not* to do something. States must simply not do it.[197] The question of whether the Council has instigated a stronger doctrine of responsibility, that is, responsibility for the terrorist acts themselves, will be addressed shortly.

2. States must exercise due diligence to prevent terrorism and protect others

Breaches of positive obligations are recognized as giving rise to responsibility in ILC Article 12.[198] According to this, it is irrelevant whether the obligation emanates from treaty, customary international law, or even Council resolution. In the commentary to this article, Council resolutions are not amidst the examples proffered by the ILC.[199] However, the ILC did not purport to provide an exhaustive list.[200]

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194. U.N. Charter art. 2, para. 4.
195. Friendly Relations Declaration, *supra* note 128, paras. 8-9 (1st princ.).
196. S.C. Res. 748, *supra* note 136; S.C. Res. 1373, *supra* note 143.
197. Pisillo-Mazzeschi, *supra* note 100, at 31-33.
198. ILC Articles, *supra* note 4, art. 12, at 46.
199. *Id.* cmt. to art. 12 ¶ 3, at 126.
200. *Id.*

Long recognized is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States," as held in the first judgment of the post-Charter Court.[201] Therefore, the state has a positive obligation to prevent terrorist activities being organized within its territory. This obligation is subject to the requirements of due diligence.[202] Ago explains that where the state does not act with due diligence:

> the Government of that State will be accused of having failed to fulfil its international obligations with respect to vigilance, protection and control, of having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter's security, and so on.[203]

As already noted, the degree of diligence due, or the standard of care, expected of a state varies depending on the primary rule in play.[204]

The Council's resolutions, in particular 1373, 1540, and 1566 would indicate that the standards of care, that is, the degree of diligence due, are higher for terrorism today than prior to 2001.[205] There has, therefore, been a change in the *primary rules*, without necessarily indicating a change in the secondary rules of attributability. The state (still identified per *Nicaragua*) remains responsible for failing to take adequate measures to prevent terrorist acts, but the measures expected of the state are more stringent than before. A failure to meet these (higher) standards would constitute a separate delict and it is for this delict, rather than the terrorist attack itself, that the state is responsible. Furthermore, by introducing obligations of (diligent) *conduct,* state responsibility depends solely on the state's action or inaction and does not require any actual terrorist attack.[206]

Ago's 1970 report explains that:

> There have been innumerable cases in which States have been held responsible for damage caused by individuals. As will be shown later, these alleged cases of State responsibility for the acts of individuals are really cases of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual's act.[207]

This is to say that the state has not been held responsible for the actions of the individuals as though they were the state's own; the non-state behavior is not attributed to the state. The state instead is only responsible for its separate delict

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201. Corfu Channel, *supra* note 24, at 22.

202. Pisillo-Mazzeschi, *supra* note 100, at 34-36.

203. Roberto Ago, *Fourth Report on State Responsibility*, [1972] 2 Y.B. Int'l L. Comm'n 70, 120 ¶ 135, U.N. Doc. A/CN.4/264.

204. *See supra* text accompanying notes 100-05.

205. *Compare* S.C. Res. 1373, *supra* note 143, ¶ 3, *and* S.C. Res. 1540, *supra* note 183, ¶ 1-3, *and* S.C. Res. 1566, *supra* note 118, ¶ 2, *with* S.C. Res. 748, *supra* note 136, ¶ 4-6.

206. *See supra* text accompanying notes 171-73.

207. Ago: Second Report 1970, *supra* note 120, ¶ 35, at 188.

(the omission of its organs). As in genocide, where omission is the basis for responsibility, there is no need to identify a state organ or agent according to *Nicaragua* or any other standard.[208]

Pisillo-Mazzeschi confirmed this interpretation in 1992. "[T]he conduct of tolerance is not an act of aggression but only a breach of the autonomous rule of customary law, which binds the State to prevent, in its territory, the organization of acts of force against foreign States."[209]

State responsibility in *Corfu Channel* hinged on such a separate delict,[210] specifically, the failure to warn shippers of the dangers of which Albania was deemed to have been aware.[211]

It thus appears that the primary rules determining the degree of due diligence to prevent terrorism have changed. But it remains possible that the secondary rules of attribution have also changed and that Ago's and Pisillo-Mazzeschi's views have been superceded. This latter possibility will now be considered.

3. States bear responsibility for injuries caused by non-state terrorist actors

Some recent scholarship has argued both descriptively and prescriptively that states should be held accountable, i.e. engage full international responsibility, for the acts of terrorists whom they support or harbor without the need to establish a connection meeting the *Nicaragua* test, but depending on a causation test or even strict liability.[212] Savarese has argued more modestly that the failure of due diligence in the context of terrorism, when followed by a specific terrorist attack, could be characterized as "complicity" albeit in a non-technical sense ("*complicità; sia pure solo in senso atecnico*").[213] However, this would not square with the Court's reading of complicity, which it considered equivalent to "aid or assistance in the commission of an internationally wrongful act" and requiring some positive action on the part of state organs or agents.[214] The arguments in support of these positions are not based solely on the Council resolutions that have been the focus of this paper, but also engage with other evidence of usus and opinio juris, in particular, the invasion of Afghanistan in the fall of 2001. It should thus be recalled that the Council has been considerably less forthright than the hegemonic power in its exposition of the rules of attribution. The President of the United States of America, immediately following the terrorist attacks on that country, but

208. *See supra* text accompanying notes 104-05.

209. Pisillo-Mazzeschi, *supra* note 100, at 36.

210. "Separate delict" is equivalent to "different wrongful act" as used by Pisillo-Mazzeschi, *id.* at 26.

211. Corfu Channel, *supra* note 24, at 22.

212. *E.g.*, BECKER, *supra* note 130, chs. 8-9; Alvarez, *supra* note 121, at 879; Vincent-Joël Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005).

213. Eduardo Savarese, *Fatti di Privati e Responsabilità dello Stato tra Organo di Fatto e "complicità" alla luce di Recenti Tendenze della Prassi Internazionale, in* LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI., *supra* note 37, at 53, 66.

214. Genocide Convention case, *supra* note 1, ¶¶ 419-21; *see also* ILC Articles, *supra* note 4, art. 16, at 47.

before the identification of any likely perpetrators, insisted that the country would make "no distinction between the terrorists who committed the attacks and those who harbor them."[215] The paucity of international responses to this incredible statement must at least in part be attributed to the political atmosphere of the moment and a reluctance to appear in any way apologetic for the thousands killed.

It would be dangerous, in this author's view, to read too much into one example of intervention in Afghanistan by a group of strong states against a very weak state at an emotionally and politically charged moment in World history.[216] It might also prove short-sighted to depend too heavily on any opinio juris of states in that now notorious second week of September 2001. The Council resolutions, on the other hand, particularly 1373 and 1540 creating, as they do, obligations on states without limit of time, create a more lasting legacy. These resolutions might be interpreted to support a theory of state responsibility for acts of terrorism by non-state actors; at least they do not exclude such an interpretation. However, such an interpretation is by no means the only reasonable one.

Resolution 1368 can certainly be reasonably interpreted as indicating an explicit assertion of state responsibility for harboring terrorists.[217] But it is inadequate to determine whether responsibility is engaged for the terrorist acts themselves or for some lesser wrong of wrongful interference. Invocation of the collective right to self-defense, in Resolutions 1368 and 1373 can also be understood as implicitly indicating state responsibility, at least if one takes the view that only a state can commit an "armed attack" and that the invasion of Afghanistan in 2001 was accordingly lawful.

On the other hand, the preamble to Resolution 1373 repeats only the customary norm that states must "refrain from organizing, instigating, assisting or participating in terrorist acts...or acquiescing" in such in its territory. Operative paragraph 2, which details examples of what this means in practice, does not go any further in indicating direct state responsibility for the results of failure.[218] Even the Council's threat of "all necessary steps" to ensure compliance does not logically require state responsibility of any particular form, since the Council's considerable powers to take measures to ensure international peace and security do not depend on any actual violation of international law.[219]

Resolution 1540 indicates a number of positive obligations upon states, but all of these can be considered within the context of a duty to take measures to prevent injuries caused by terrorism to the standards of due diligence.[220] State responsibility would thus be based on a separate delict – taking inadequate

215. President George W. Bush, Statement by the President in his Address to the Nation, (Sept. 11, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html; *see also* U.N. SCOR, 56th Sess., 4370th mtg. at 7-8, U.N. Doc. S/PV.4370 (Sept. 12, 2001).

216. *C.f* Nicaragua, *supra* note 2, ¶ 186 (noting that customary international law has room for exceptions).

217. S.C. Res. 1368, *supra* note 131, ¶ 3.

218. S.C. Res. 1373, *supra* note 143, ¶ 2.

219. *See supra* text accompanying notes 134-35.

220. S.C. Res. 1540, *supra* note 183, ¶ 3.

measures – rather than for any terrorist attack. Therefore, the identity of the actors as organs or agents is irrelevant.

The Resolutions, taken together, are insufficient to determine a change in the secondary rules of state responsibility. It is one possible interpretation, but the more plausible interpretation is that they do not.

D. The Impact of the Council on State Responsibility for Terrorism

The Council is clearly purporting to change the norms of international law, whether it be primary or secondary rules. If it is authorized to change either, it is authorized to change both. There is no reason why the "rules of change" in international law should differ depending on whether primary or secondary rules are at stake.

If we agree only that states permitting terrorists to operate in their territory violate a separate (positive) obligation, then there is no change to the secondary rules of international law; instead, only the standard of due diligence has been strengthened, that is, the content of the primary rules. On the other hand, if it is to be accepted that states harboring terrorists are to be considered responsible for the results of terrorist activities, even in the absence of a de jure connection, complete dependence, or effective control, then we must accept that the secondary rules of international law have been amended as far as responsibility for terrorism is concerned. This would indicate that responsibility for terrorism is lex specialis, as facilitated by Article 55 of the ILC Articles.

In this latter case we are then lead back to the broader question of whether the Council has the authority to create such a derogation in the pursuit of international peace and security. If the Council can, should, and does create international law binding on every member state, what are the implications of this for the consensual basis of international law? These questions have been addressed elsewhere and views range across the spectrum. Eric Rosand claims that the Council certainly does have this authority and, moreover, there is no contradiction with the consensual theory of international law as member states have consented to this power by virtue of the Charter.[221] By contrast, Happold argues that legislative behavior in the Council is both ultra vires and most undesirable, undermining as it does "sovereign equality" of states and the Charter principles.[222]

The Charter is both treaty and constitution of the United Nations. As the latter, it is a living document and its norms may be subject to modification by customary international law.[223] In this context, it is possible that the broad acceptance by states of the Council's "legislative" behavior indicates a shift in customary international law. The evidence is inconclusive. At best, compliance with the legislative features of Resolutions 1373 and 1540 indicate adequate state

221. Rosand, *supra* note 121, at 574; *see* U.N. Charter arts. 24, 25, 48, 103; *see also* Bianchi, *supra* note 121, at 888-92 (arguing in favor of the Council's "legislative" actions on the basis of a kind of international state of emergency); Szasz, *supra* note 121, at 901.

222. Happold, *supra* note 121, at 607-10; *see also* Arangio-Ruiz, *supra* note 121, at 690.

223. Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 614-15 (2003); Arangio-Ruiz, *supra* note 121, 689-91.

practice and opinio juris, albeit with Cuba as persistent objector.[224] However, this is probably too bold a claim, given the concerns raised by other states, including examples from Africa, Asia, Europe and Latin America, prior to the acceptance of Resolution 1540.[225] Certainly, it is too early to suggest that such a customary international norm has yet crystallized, and further examples of both Council's "legislation" and state acceptance of the same will be necessary before such a determination can confidently be made.

On the other hand, the overwhelming acceptance of the primary norms on counter-terrorism, originating in the Council's resolutions, indicate that customary international law pertaining to state obligations regarding terrorism has now changed, notwithstanding doubts over the authority of the Council to promulgate such norms. In this latter case, it is not the authority of the Council that creates the binding norm, but rather its later endorsement by states, in the form of usus and opinio juris that creates the norm. This would imply not that the Council has the power to make law, but only that it is has a strong influence on the development of customary international law; its ultimate formation will depend on states' behavior.[226]

IV. THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES AND STATE RESPONSIBILITY TO RESPECT, PROTECT AND FULFILL HUMAN RIGHTS

A. The Treaty Bodies

The seven human rights treaty bodies are as follows: the Human Rights Committee (HRC), monitoring the International Covenant on Civil and Political Rights (ICCPR);[227] the Committee on Economic, Social and Cultural Rights (CESCR), monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR);[228] the Committee on the Elimination of Racial Discrimination (Race Committee), monitoring the Convention for the Elimination of Racial Discrimination (CERD);[229] the Committee on the Elimination of Discrimination Against Women (Women's Committee), monitoring the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);[230] the Committee Against Torture (Torture Committee), monitoring the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

224. *See supra* text accompanying note 170; *see also* U.N. GAOR, 56th Sess., 13th plen. mtg. at 14-16, U.N. Doc. A/56/PV.13 (Oct. 1, 2001) (speech by Mr. Rodríguez Parrilla of Cuba).

225. *See supra* notes 188-89; *see generally* Lavalle, *supra* note 121.

226. *See* Arangio-Ruiz, *supra* note 121, at 693.

227. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

228. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The monitoring Committee is not an original part of the Covenant, but was established later by ECOSOC Res. 1985/17. U.N. Econ. & Soc. Council [ECOSOC] Res. 1985/17, ¶¶ 7-8, 18, U.N. Doc. E/RES/1985/17 (May 28, 1985).

229. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 5 I.L.M. 352, 660 U.N.T.S. 195 [hereinafter CERD].

230. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

Punishment (CAT);[231] the Committee on the Rights of the Child (Children's Committee), monitoring the Convention on the Rights of the Child (CRC) and its Optional Protocols[232] and the Committee on Migrant Workers (Migrant Workers' Committee), monitoring the International Convention on the Rights of All Migrant Workers and Members of Their Families (MWC).[233] Each of these receives and considers reports of state parties and gives concluding comments or observations following discussion with state representatives. They also make general comments or general recommendations addressed to all states, with some committees being considerably more prolific than others.[234] The HRC, Race Committee, Women's Committee and Torture Committee permit, subject to state consent, individual communications, with the HRC receiving by far the bulk of these.[235] The Migrant Workers' Committee will also be able to hear communications once 10 states accede to the procedure; as of September 2007, of 37 state parties, none had made the requisite declaration.[236]

CAT contains provisions for state focused inquiries[237] and the recently established Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment will be authorized to make regular visits to state parties to monitor conditions in detention of consenting state parties.[238] The CEDAW Committee can also now undertake inquiries under its Optional Protocol.[239] The Race Committee is not explicitly authorized by treaty to undertake inquiries, but does have an early warning and urgent procedure, whereby

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231. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter CAT].

232. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/54/49 (May 25, 2000); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. Doc. A/54/49 (May 25, 2000).

233. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, May 2, 1991, 30 I.L.M. 1517 [hereinafter MWC]. One new body has be en established by its convention, the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 46 I.L.M. 443, and another new body will be created once its convention comes into force, the International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, Annex, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

234. *See* U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.8 (May 8, 2006) [hereinafter Compilation of General Comments].

235. Optional Protocol to the International Covenant for Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter OP-ICCPR]; CAT, *supra* note 231, art. 13; CERD, *supra* note 229, art. 14; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Dec. 10, 1999, 2131 U.N.T.S. 83 [hereinafter OP-CEDAW].

236. MWC, *supra* note 233, art. 77.

237. CAT, *supra* note 231, art. 20. At the time of writing this procedure had been used on five occasions.

238. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 11, Dec. 18, 2002, 42 I.L.M. 26.

239. *See* OP-CEDAW, *supra* note 235, arts. 8-10.

they make decisions and send letters to states when they have immediate concerns that cannot wait until the timetabling of the next state report.[240]

CAT, the MWC, CERD and the ICCPR provide the opportunity for state parties to complain to the respective monitoring treaty bodies about the poor compliance of another state party.[241] In the former two cases, the treaty body considers the complaint; in the latter two, it should create an ad hoc Conciliation Commission.[242] CAT, CEDAW and the MWC also explicitly provide for negotiation, followed by arbitration, to resolve disputes as to "interpretation or application" of the Conventions and, failing to reach agreement, states can bring a case before the International Court of Justice.[243] These inter-state complaint procedures had never, as of November 2007, been exercised by state parties.[244]

The treaty bodies are in a peculiar position. They are created principally to receive the state reports on which they are authorized to make "suggestions", "general comments" or "general recommendations" in their annual reports to the General Assembly and, in later treaties, also directly to state parties.[245] They are authorized to interpret the conventions and to identify violations.[246] Even in the individual communications procedures, they are authorized only to transmit "views," not "opinions" or "judgments".[247] Nevertheless, the interpretations of the committees have had considerable influence on the understanding and application of the conventions.[248]

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240. Office of the U.N. High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, Early-Warning Measures and Urgent Procedures, http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about (last visited Sept. 19, 2008) (stating that the mechanism was adopted in 1993).

241. CAT, *supra* note 231, art. 21; MWC, *supra* note 233, art. 76; CERD, *supra* note 229, art. 11; ICCPR, *supra* note 227, art. 41.

242. CAT, *supra* note 231, art. 21; MWC, *supra* note 233, art. 76; CERD, *supra* note 229, art. 12; ICCPR, *supra* note 227, arts. 42-43.

243. CAT, *supra* note 231, art. 30; CEDAW, *supra* note 230, art. 29; MWC, *supra* note 233, art. 92. It should also be noted that under the Statute of the Court, any question of treaty interpretation or purported failure of implementation can be brought before the Court, subject to general provisions on state consent to its jurisdiction. Statute of the Court, *supra* note 5, art. 36.

244. Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUM. RTS. L. REV. 109, 118 n.43 (2007); *see also* Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies Complaints Procedures, http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate (last visited Oct. 2, 2008).

245. ICCPR, *supra* note 227, art. 40(4); CERD, *supra* note 229, art. 9(2); CEDAW, *supra* note 230, art. 21; CAT, *supra* note 231, art. 19; CRC, *supra* note 241, art. 45(d); MWC, *supra* note 233, art. 74(1).

246. *See* United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last visited Oct. 6, 2008).

247. CAT, *supra* note 231, art. 22(7); MWC, *supra* note 233, art. 77(7); OP-ICCPR, *supra* note 235, art. 5(3); OP-CEDAW, *supra* note 235, art. 7(3). The Race Committee is authorized to give "suggestions and recommendations." CERD, *supra* note 229, art. 14(7)(b). The HRC now issues "views" and CEDAW has taken to issuing "decisions," the latter suggesting a more legal process.

248. *See* Int'l L. Assoc., Comm. on Int'l Human Rights L. & Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Berlin Conference 2004*, ¶¶ 175-182 (2004), http://web.abo.fi/instut/imr/research/seminars/ILA/Report.pdf.

With reference to state responsibility regimes under these treaties the first thing that must be noted is that they are, in fact, treaties. As such, to the extent that the treaties themselves contain provisions that indicate particular modes of state responsibility, they are lex specialis.[249]

Nevertheless, international human rights law, to which the treaty bodies are major contributors, and the general rules of state responsibility in international law do not exist in parallel universes. Article 50(1)(b) of the ILC Articles requires that counter-measures do not compromise "obligations for the protection of fundamental human rights," and the commentary to this Article cites both the ICCPR and the ICESCR as examples of "elements of general international law" as well as making reference to the CESCR's General Comment No. 8.[250] The ILC refers also to the ICCPR, with reference to articles 14, 15, 20 and 30, as well as citing communications of the HRC in its commentary.[251] The HRC responded to the ILC Articles with a general comment dedicated to explaining their relevance and application to the ICCPR.[252] The treaty bodies' regimes are not self-contained regimes in all respects.[253]

B. State Responsibility in the Eyes of the Treaty Bodies

It serves to examine some of the recent work of the treaty bodies to consider the predominant visions of state responsibility that they have applied. What has become apparent is an increasing reliance on the tertiary model of state responsibility for human rights, that is, responsibility to respect human rights (do no harm), to protect human rights (prevent harm by non-state actors) and to fulfill human rights (guarantee minimums of wellbeing).[254]

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249. ILC Articles, *supra* note 4, art. 55 at 58.

250. ILC Articles, *supra* note 4, cmt. to art. 50, ¶ 7, at 335; ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 8, U.N. Doc. E/1998/22, (Dec. 4, 1997), *reprinted in* Compilation of General Comments, *supra* note 234, at 51. *See also* Malcolm D. Evans, *State Responsibility and the European Convention on Human Rights: Role and Realm*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 139, 142 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

251. ILC Articles, *supra* note 4, cmt. to arts. 14, ¶ 11; 15, ¶ 6 n.276; 20, ¶ 10 n.349, 30 ¶ 13 n.476.

252. U.N. Hum. Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21Rev.1/Add.13 (May 29, 2004), *reprinted in* Compilation of General Comments, *supra* note 234, at 233 [hereinafter HRC General Comment No. 31].

253. *See* ILC Articles, *supra* note 4, cmt. to art. 55, ¶ 5, at 358; Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, ¶¶ 174-93, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi); Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 161, 165, *supra* note 250; *but see* Evans, *supra* note 250, at 160 (arguing that state responsibility in human rights, per the European Court of Human Rights and state responsibility in the ILC Articles are best considered "as operating in altogether different realm[s]"). The arguments relating to the European regime are not, as will be argued, equally applicable to the U.N. treaty bodies.

254. *See* Byrnes & Connors, *supra* note 3.

This model traces its origins to Henry Shue and Asbjørn Eide in the mid 1980s.[255] The extent to which each of the seven bodies engages with it varies and can be seen most explicitly in the operation of the CESCR. The Torture Committee, no doubt feeling the constraints of its text which clearly prioritizes "state" torture, traditionally confined its concerns to the duty to respect. However, in recent years, it has expanded its gaze to the duty to protect but has not seen scope to consider duties to fulfill.[256] The reasons for this shall be explored below.[257]

Given the enormous volume of work of the treaty bodies, a workload with which even they struggle to keep up, a select review of the treaty bodies' work shall be provided to demonstrate their engagement with the tertiary model.[258]

The CESCR explicitly relied upon this scheme in 1999 to frame General Comment No. 12 and it has appeared in every general comment issued by that committee since.[259] Moreover, the concluding comments on state reports clearly

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255. Special Rapporteur, *Report on the Right to Adequate Food as a Human Right*, ¶¶ 34–36, 112–15, 167–81, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). This tertiary system is followed by the African Comm'n on Human and Peoples' Rights. *See, e.g.*, Soc. & Econ. Rights Action Ctr. [SERAC] v. Nig., African Comm'n on Human & Peoples' Rights, Commc'n. No. 155/96 (2001), *available at* http://www.escr-net.org/usr_doc/serac.pdf. The European Court of Human Rights and the Inter-American Court of Human Rights recognize positive duties principally at the level of protection. *See, e.g.*, X & Y v. Netherlands, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 239-40 (1985); A v. UK, App. No. 25599/94, 27 Eur. H.R. Rep. 611 (1998); Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 56 (2001); Morales v. Guatemala, 1999 Inter-Am. C.H.R. Series C, No. 63, ¶¶ 144, 191 (Nov. 19, 1999), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf. In this latter case, the court bordered on recognizing a duty to fulfill the right to life to ensure one would "not be prevented from having access to the conditions that guarantee a dignified existence."

256. *See* Catharine A. MacKinnon, *On Torture: A Feminist Perspective on Human Rights, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 21 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation,* 21 BROOK J. INT'L L. 799, 847-48 (1996); *see also* Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 390 (1999).

257. *See infra* text accompanying notes 327-29.

258. On volume of work, *see* Rachael Lorna Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified U.N. Human Rights Treaty Body,* 7 HUM. RTS. L. REV. 173, 178-81 (2007). A more thorough examination of the tertiary scheme in practice can be found in Rachael Lorna Johnstone, *Feminist Influences on the United Nations Human Rights Treaty Bodies,* 28 HUM. RTS. Q. 148, 154-80 (2006) [hereinafter Johnstone: Feminist Influences].

259. ECOSOC, *General Comment No. 12: The right to adequate food (art. 11)*, ¶ 14, U.N. Doc. E/C.12/1999/5 (May 12, 1999), *reprinted in* Compilation of General Comments, *supra* note 234, at 63, 66. *See also* ECOSOC, *General Comment No. 13: The right to education (art. 13)*, ¶ 46, U.N. Doc. E/C.12/1999/10 (Aug. 12, 1999), *reprinted in* Compilation of General Comments, *supra* note 234, at 71, 80; ECOSOC, *General Comment No. 14: The right to the highest attainable standard of health (art. 12)*, ¶ 33, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), *reprinted in* Compilation of General Comments, *supra* note 234, at 86, 94; ECOSOC, *General Comment No. 15: The right to water (arts. 11 and 12 of the Covenant)*, ¶ 25, U.N. Doc. 3/C.12/2002/11 (Jan. 20, 2003), *reprinted in* Compilation of General Comments, *supra* note 234, at 105, 111; ECOSOC, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)*, ¶¶ 17-21, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), *reprinted in* Compilation of General Comments, *supra* note 2344, at 122, 125-26; ECOSOC, *General Comment No. 17: The right of everyone to benefit from the*

indicate that state parties are obliged to ensure human rights on all three levels.[260] To give recent examples, concerns have been expressed about: the level of the minimum wage, the impact of privatization on workers' rights, and discrimination between families of war victims,[261] which can be considered pertinent to duties to respect human rights; gender stereotypes, domestic violence, human trafficking and racial prejudice,[262] all of which can be seen as matters of protecting human rights; and finally unemployment, poverty, malnutrition, consumption of illegal drugs, HIV/AIDS, housing and the education of Romani children,[263] which envisage state duties to fulfill human rights, even where neither state nor private delict can be said to be the cause of the human rights failure.

The duty to respect, protect and fulfill economic, social and cultural rights was entrenched in the Maastricht guidelines on violations of economic, social and cultural rights.[264] Although these guidelines are not strictly limited to the ICESCR, they are clearly influenced by the work of the CESCR and are intended to provide further clarification of what is required of states to fulfill their treaty obligations under the Covenant. The tertiary framework is explicitly introduced with the comment that "[l]ike civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill."[265] It is significant that the tertiary framework is not considered some special characteristic of economic, social and cultural rights, but in fact pervades the whole range of international human rights.[266]

Obligations of conduct and result are distinguished in the Maastricht Guidelines, although more in line with the French understanding of *obligation de moyens* (obligation to act to a professional standard) and *obligation de résultat*

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protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15), ¶¶ 28-34, 44-46, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), *reprinted in* Compilation of General Comments, *supra* note 234, at 131, 137-39, 142-43; ECOSOC, *General Comment No. 18: The right to work (art. 6)*, ¶¶ 22-28, 33-36, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006), *reprinted in* Compilation of General Comments, *supra* note 234, at 148, 153-54, 156-57.

260. *See, e.g.*, *infra* notes 262-64.

261. ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Uzbekistan*, ¶¶ 15, 19, U.N. Doc. E/C.12/UZB/CO/1 (Nov. 25, 2005) [hereinafter CESCR Uzbekistan 2005]; ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Bosnia and Herzegovina*, ¶¶ 15, 18, U.N. Doc. E/C.12/BIH/CO/1 (Nov. 25, 2005) [hereinafter CESCR Bosnia 2005].

262. CESCR Uzbekistan 2005, *supra* note 261, ¶¶ 24-25; CESCR Bosnia 2005, *supra* note 261, ¶¶ 21-22; ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Libyan Arab Jamahiriya*, ¶¶ 12, 14, U.N. Doc. E/C.12/LYB/CO/2 (Nov. 25, 2005) [hereinafter CESCR Libya 2005].

263. CESCR Uzbekistan 2005, *supra* note 261, ¶¶ 17, 27, 31-33; CESCR Bosnia 2005, *supra* note 261, ¶¶ 13, 23, 24, 29; CESCR Libya 2005, *supra* note 262, ¶¶ 15, 17, 19.

264. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998) [hereinafter *Maastricht Guidelines*].

265. *Id.* at 693.

266. *See, e.g.*, ECOSOC, *General Comment No. 12*, *supra* note 259, ¶ 15, at 66; ECOSOC, *General Comment No. 15*, *supra* note 259, ¶ 20, at 110 (applying the tertiary framework "like [for] any other human right.").

(obligation to achieve a particular end), rather than the distinction introduced by Ago in the first reading of the ILC Articles between obligations of conduct (obligations to do something specific) and obligations of result (obligations to achieve a particular end, with discretion as to means).[267] The Maastricht guidelines indicate a degree of discretion for obligations of conduct in determining which particular measures should be taken ("measures reasonably calculated", or "all appropriate means") that does not fit with Ago's understanding.[268]

A chapter on state responsibility for violations (whether from failure to respect, protect or fulfill, from action or omission) is contained in the Maastricht guidelines.[269] It is based on territorial control, prima facie jurisdiction, but in the case of alien domination or occupation, also "effective control."[270] In this context, "effective control" is intended to mean effective control of a physical location or over individual potential victims, not control over perpetrators in the *Nicaragua* sense.[271] The intention is to ensure that where states operate outside of their own territory (such as in situations of military occupation or peacekeeping), state actors must respect the human rights of all those over whom they exercise authority and also exercise due diligence to protect the human rights of those persons.[272] The duty of due diligence in control of private entities, "including transnational corporations over which they exercise jurisdiction" to guarantee ICESCR rights is specified.[273] States are also reminded of their responsibility for acts of international organizations of which they are members and should ensure they too conform to the Covenant.[274]

Violations of the ICESCR "are in principle imputable to the State within whose jurisdiction they occur."[275] However, from the examples given, it is quite clear violations are violations by state organs or agents, or omissions where the state had a duty to act.[276] To the extent private violations of human rights occur, state responsibility, under the Maastricht guidelines, depends on due diligence.[277]

State responsibility, therefore, is not engaged every time someone's rights are apparently infringed; responsibility of the state will depend on a separate delict, most commonly in the form of an omission, but also possibly in the form of tolerance or a cover-up on the part of the state, e.g. in disappearances or domestic violence cases. Responsibility is not for the injury, but for the state's tolerance or attempt to cover-up. As long as minimum core obligations are satisfied, such as access to basic food and healthcare, the state will have a defense of having taking

267. *Maastricht Guidelines*, *supra* note 264, at 694; on possible confusion arising from the terminology, see *supra* note 92.

268. *Maastricht Guidelines*, *supra* note 264, at 694; ICESCR, *supra* note 228, art. 2(1).

269. *Id.* at 698.

270. *Id.*

271. *Id.*; *see* Nicaragua, *supra* note 2, , ¶ 115 at 65.

272. *See Maastricht Guidelines*, *supra* note 264, at 698.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 696-97.

277. *Id.*

"all appropriate means" within the context of its own condition of economic development to prevent or redress the private wrong or to ensure that the rights under the ICESCR have been fulfilled.[278]

In case it be thought that the ICESCR is a special case of mandating positive rights, the work of the HRC should also be examined. Again, the concluding comments on state reports demonstrate that the HRC considers state parties responsible for respecting, protecting and fulfilling the human rights contained in the ICCPR.[279] Their work demonstrates an emphatic rejection of the purported division of positive and negative rights between the two covenants, this distinction having long been rubbished in academic commentary.[280]

As early as 1981, the HRC expressed the view that it was inadequate for state parties to "respect" human rights, but that they must also take positive measures to guarantee their full enjoyment for all inhabitants:

> The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction...in principle this undertaking relates to all rights set forth in the Covenant.[281]

This comment was superseded in 2004 by General Comment No. 31, issued in response to the ILC Articles.[282] Like its predecessor, it emphasizes the positive duties that state parties to the ICCPR have accepted and specifically explains that although there is no direct horizontal effect (i.e. individuals do not have obligations under the Convention), states must "exercise due diligence to prevent, punish, investigate or redress" violations by private persons or entities.[283] The beneficiaries of the obligations are human beings, but not only citizens; instead, all persons within the "effective control" of the state must be protected.[284] Although the HRC could not have been unaware of the meaning of "effective control" in *Nicaragua,* in the General Comment it does not refer to "effective control" of the actors, but

278. *Id.* at 695.

279. *See, e.g.,* U.N. Human Rights Comm. [HRC], *Report of the Human Rights Committee on the Eighty-fifth, Eighty-sixth & Eighty-seventh Sessions Vol. 1*, ¶ 67, U.N. GAOR, 61st Sess., Supp. No. 40, U.N. Doc. A/61/40, (2006) [hereinafter HRC 2006 Report].

280. Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,* 141 U. PA. L. REV. 1, 46, 71 (1992); Cécile Fabre, *Constitutionalising Social Rights,* 6 J. POL. PHIL. 263, 268-70 (1998); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 180-86 (2d ed. 2000).

281. HRC, *General Comment No. 3: Article 2 (Implementation at the national level)*, ¶ 1, *reprinted in* Compilation of General Comments, *supra* note 234, at 164.

282. HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, *supra* note 252, ¶ 1.

283. *Id.* ¶ 8, at 235.

284. *Id.* ¶ 10, at 236.

rather "effective control" of "territory and jurisdiction."[285] This use is comparable to that found in the Maastricht guidelines.[286]

Although not following the terminology of duties to respect, to protect and to fulfill, recognition of state responsibility at all three levels is implicit in the HRC's output as can be seen from the example of General Comment No. 28 on gender equality.[287] Duties to respect human rights in this Comment include review of domestic law to ensure women do not face direct discrimination, for example, with regard to regulations on women's clothing, women's freedom to travel, access to judicial process, marriage and its dissolution, and social security law.[288] States should also report on conditions for women in prison.[289] However, the need for "positive measures in all areas so as to achieve the effective and equal empowerment of women" makes it quite clear that the duty to respect is not the beginning and end of state responsibility.[290] State parties must protect women and girls from murder and infanticide within the family, domestic violence and other violence including rape and female genital mutilation, trafficking and forced prostitution, and discrimination in employment.[291] Furthermore, states should report on their efforts to fulfill women's rights to the same degree as those of men by providing information on maternal and infant mortality, poverty and deprivation amongst women, and "must...take effective and positive measure" to promote women's equal participation in public life, "including appropriate affirmative action."[292]

Concluding observations from recent state reports also demonstrate obligations to respect, protect and fulfill human rights.[293] Examples of concerns about respect of human rights include the conduct of law enforcement personnel, conditions of suspects in the "war on terror," deportation to face the risk of torture, women in prison, especially mothers, and de jure discrimination against native women and their children.[294] Duties to protect human rights are evident in the HRC's interest in domestic violence, the high rate of violent death amongst native women, slavery and human trafficking, hate speech, violence and hate crime against gays and lesbians, and gender discrimination in employment.[295] Responsibility to fulfill human rights is apparent where the HRC considers the

285. *Id.*; *Cf.* ICCPR, *supra* note 227, art. 2(1) (requiring states to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant").

286. *See supra* text accompanying note 270; *see also* HRC 2006 Report, *supra* note 279, ¶ 84(10). *But see* Banković v. Belgium, (Admissibility) (No. 52207/99), 2001-XII Eur. Ct. H.R. 335; Evans, *supra* note 250, at 152 (indicating a different approach in the European Court of Human Rights).

287. HRC, *General Comment No. 28: Article 3 (The equality of rights between men and women), reprinted in* Compilation of General Comments, *supra* note 234, at 218.

288. *Id.* ¶¶ 13, 16, 18, 25-26, 31, at 220-24.

289. *Id.* ¶ 15, at 220-21.

290. *Id.* ¶ 3, at 218.

291. *Id.* ¶¶ 10-12, 31, at 220, 224.

292. *Id.* ¶¶ 10, 29 at 220, 224.

293. *See, e.g.*, HRC 2006 Report, *supra* note 279, ¶¶ 76(15), 78(12), 79(10)-(11), 81(16), 84.

294. *Id.*

295. *Id.*¶¶ 76(23), 78, 79(9), 81(12), 84(28).

conditions of life for street children, Roma, and the unequal racial impact of homelessness and natural disasters.[296]

The majority of communications considered by the HRC pertain to purported violations by state organs, i.e. violations of the duty to respect human rights which would engage liability within the *Nicaragua* paradigm.[297]

State responsibility for a failure to respect human rights will depend on attribution to a state organ or agent identified per *Nicaragua*. As under the ICESCR, state responsibility is not automatic for every private delict but will always depend on evidence of a separate delict on the part of the state, as will responsibility for failure to fulfill human rights.[298] Responsibility for failing to protect or fulfill the rights of the ICCPR will depend on evidence that the state has not taken the (positive) measures that it should have, i.e. it has not acted with due diligence.[299]

The texts of CEDAW, the CRC and MWC all indicate an explicit acceptance by state parties of positive obligations and, unsurprisingly, their respective treaty bodies support the tertiary model of state responsibility.[300] With reference to

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296. *Id.* ¶¶ 78, 79(22), 84(26).

297. *See id.* ¶¶ 107-226 (summarizing cases by issue, including procedural matters from 107-43, substantive matters from 144-202, and remedies from 203-26).

298. *See* Nicaragua, *supra* note 2, 269.

299. ICCPR, *supra* note 227, art. 2(2).

300. CEDAW, *supra* note 230, arts. 2, 3, 5, 6, 10, 11, 12, 14; CRC, *supra* note 232, arts. 11, 19, 20, 23, 24, 26, 27, 28, 32-36, 39; MWC, *supra* note 233, arts. 25, 28, 30, 31, 43, 45, 68. Duties at all three levels are ubiquitous in the concluding comments of the Women's Committee and the Children's Committee. *See, e.g.*, U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 61st Sess., Supp. No. 38, U.N. Doc. A/61/38 (2006); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Kazakhstan*, U.N. Doc. CRC/C/KAZ/CO/3 (June 19, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Uruguay*, 45th Sess., U.N. Doc. CRC/C/URY/CO/2 (July 5, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Maldives,* 45th Sess., U.N. Doc. CRC/C/MDV/CO/3 (July 13, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Slovakia*, 45th Sess., U.N. Doc. CRC/C/SVK/CO/2 (July 19, 2007). At the time of writing, the Migrant Workers' Committee had reviewed only three state reports, but, as well as duties on state actors to respect human rights, duties to protect and fulfill are also illustrated. For example, duties to protect are illustrated in concerns about discrimination against migrant workers, human trafficking, violence and exploitation facing migrant workers, especially domestic workers, and the vulnerability of unaccompanied minors to abuse and exploitation. Additionally, duties to fulfill are illustrated in concerns about access to school for migrant workers' children and access to medical care. *See, e.g.*, U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mali*, ¶¶ 22-23, U.N. Doc. CMW/C/MLI/CO/1 (May 31, 2006); U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico*, ¶¶ 24, 27, 29, 33, 39, 41, U.N. Doc. CMW/C/MEX/CO/1 (Dec. 20, 2006); U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Egypt*, ¶¶ 20, 36, 38, 50, U.N. Doc. CMW/C/EGY/CO/1 (Dec. 20, 2006).

broader norms of state responsibility, the Women's Committee reminds state parties in General Recommendation No. 19 on violence against women: "[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[301] The tertiary model is employed in later general comments.[302]

Of the few communications to date considered by the Women's Committee, three stand out as "classic" examples of state failure to protect human rights, each being concerned with domestic violence. The first, *A.T. v Hungary,* is perhaps a paradigm of the discourse between treaty body and state party envisaged by the drafters of the Protocol.[303] In this case, the communications system brings a problem to the attention of a state party, the state acknowledges that its legal system and institutions are inadequate, promises to take measures to improve protection even before the inevitable finding of a violation of CEDAW, and further, at least according to the state party, these measures have largely now been introduced.[304] The other two communications, *Goekce v Austria*[305] and *Yildirim v Austria*[306], warrant less optimism, not the least of which because by the time of the communication, the victims had already been murdered by violent partners, but also because of the adversarial and defensive response of the state party which insisted that its institutions had not failed either victim and that, in the former case at least, the victim herself bore responsibility for having failed to leave, implying

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301. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women*, ¶ 9, U.N. Doc. A/47/38, *reprinted in* Compilation of General Comments, *supra* note 234, at 303.

302. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the convention (women and health)*, ¶¶ 13-17, A/54/38Rev.1, *reprinted in* Compilation of General Comments, *supra* note 234, at 332-33; U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)*, ¶ 4, A/54/38Rev.1, *reprinted in* Compilation of General Comments, *supra* note 234, at 337.

303. U.N. Comm. on the Elimination of Discrimination Against Women, *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3 of the Optional Protocol to the Convention on the elimination of All Forms of Discrimination against Women, Communication No. 2/2003, Ms. A. T. v. Hungary, in Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/60/38(Part I) Annex III ¶¶ 9.3-9.7 [hereinafter *A.T. v Hungary*].

304. *Id.* ¶¶ 5.6-5.10. *See also* U.N. Comm. on the Elimination of Discrimination Against Women, *Sixth Periodic Report of the Republic of Hungary to the United Nations on the Elimination of All Forms of Discrimination Against Women*, arts. 1-4, 16, U.N. Doc. CEDAW/C/HUN/6 (June 15, 2006).

305. U.N. Comm. on the Elimination of Discrimination Against Women, *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Communication No. 5/2005, Goekce v. Austria*, Annex, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007) [hereinafter *Goekce v. Austria*].

306. U.N. Comm. on the Elimination of Discrimination Against Women, *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Communication No. 6/2005, Yildirim v. Austria*, U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007) [hereinafter *Yildirim v. Austria*].

that the violence that marred the relationship was attributable equally to the victim and even playing a cultural relativism card, suggesting that the perpetrator's "background" (Turkish) explains and justifies his "harsh statements" (i.e. death-threats).[307]

The Women's Committee's approach in all three cases is to recognize the duty of "due diligence," with particular reference to General Recommendation 19.[308] This has been violated by both state parties, but in subtly different manner. In the Austrian cases, there are laws and institutions in place which should provide protection to the standard required by CEDAW. However, there has been a manifest failure by the state organs to apply them to the necessary extent. This is the separate delict. By contrast, Hungary simply lacked the necessary mechanisms altogether. There was no single state organ that could be said to have failed to exercise due diligence because no single state organ had the power to take the requisite action to protect A.T. Instead, the fault, the separate delict, attaches to the "state authorities considered as a whole" for not ensuring a system of protection to meet its primary obligations.[309]

Where the Women's Committee's analysis departs from that of the Court in the Genocide Convention case is in the former's lack of concern with the matter of causation.[310] In cases of non-state perpetrators of human rights violations, it can perhaps never be conclusively established that even had the state taken all appropriate measures, the violation would have been prevented. This is especially so with regard to cases of domestic violence; in the most progressive states with extensive legal and social protection for victims of domestic violence and dedicated efforts to change cultural norms that perpetuate the acceptability of such violence, domestic violence still occurs, even to the extent of homicide.

It must also be recalled that the principles for reparation *to an injured state* for failing to prevent genocide as considered by the Court need not be equivalent to the principles for reparation to *injured human persons* under human rights treaties. Causation is briefly mentioned as necessary to establish a right to reparation in the second reading of the ILC Articles, but is drafted in view of injuries to other states, not injuries to human persons.[311] It is also made clear in the commentary that the principles of causation are an aspect of primary, not secondary, rules and hence, there is no standard of causation common to all primary rules.[312]

The Women's Committee, furthermore, has not hindered itself to the same extent as the Court in the Genocide Convention case with an insurmountable

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307. *Goekce v. Austria*, *supra* note 305, ¶ 8.8. *See also id.* ¶¶ 4.2-4.5, 8.4-8.6, 8.14.

308. *A.T. v. Hungary*, *supra* note 303, ¶ 9.2; *Goekce v. Austria*, *supra* note 305, ¶¶ 12.1.1, 12.3; *Yildirim v. Austria*, *supra* note 306, ¶ 12.1.1.

309. *See supra* text accompanying notes 104-05.

310. *See supra* text accompanying note 94.

311. *See* ILC Articles, *supra* note 4, art. 31, at 223; *see also* Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS, *supra* note 250, at 129, 135-36.

312. ILC Articles, *supra* note 4, cmt. to art. 31, ¶ 10, at 227-28.

burden of proof;[313] instead, to the extent that the communications process can be considered a kind of legal proceeding, it is of a civil nature and therefore a balance of probabilities/preponderance of evidence test is adequate.[314] The Women's Committee does not belabor the point, and the parties do not argue it, but it can be assumed that if these two violent men had been in prison, they could not have committed murder; if one man were not permitted access to the family home, he would find it considerably harder to beat his ex-partner. Furthermore, the vast majority of the remedies suggested by the Women's Committee are "forward-looking." Only with regard to A.T. is compensation indicated (it being of little comfort to the two deceased or their survivors in the Austrian cases) and the other case-specific remedies are concrete suggestions as to how the state can meet the requirements of due diligence in the particular case, namely by providing a home, child support and legal assistance to enable A.T. to live free from violence.[315] In all three cases, systemic changes are recommended which, if implemented, would satisfy the positive obligations of the states under CEDAW with regard to eliminating, or at least reducing, domestic violence.[316] If these are implemented and, notwithstanding such efforts, domestic violence continues to occur, the states will not be easily said to bear responsibility as there will be no separate delict.

The Race Committee was ambivalent through the 1990s concerning the extent of state obligations to protect and fulfill the rights under CERD. However, a change of direction occurred in 1999 and was brought to the fore the following year in General Recommendation No. XXV: Gender Related Dimensions of Racial Discrimination.[317] The later General Recommendation pertaining to non-citizens also indicates the need for respect, protection and fulfillment of human rights.[318] For example, state parties should eliminate discrimination in legislation and immigration policy, and ensure law enforcement agents do not ill-treat or discriminate against non-citizens in order to respect human rights.[319] They must also protect persons from hate speech and racial violence and discrimination in employment.[320] Rights must also be fulfilled to ensure "equal enjoyment of the right to adequate housing" and adequate physical and mental health.[321]

313. *See supra* note 65; *see also supra* text accompanying note 76.

314. *See A.T. v Hungary*, *supra* note 303, at ¶¶ 9.3-9.6.

315. *Id.* ¶ 9.6(I).

316. *Id.* ¶ 9.6(II); *Goekce v. Austria, supra* note 305, ¶ 12.3; *Yildirim v. Austria*, *supra* note 306, ¶12.3.

317. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXV on gender-related dimensions of racial discrimination*, ¶¶ 1-6, A/55/18, Annex V at 152 (2000), *reprinted in* Compilation of General Comments, *supra* note 234, at 258-59; *see also* Johnstone: Feminist Influences, *supra* note 258, at 171.

318. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXX on discrimination against non-citizens*, CERD/C/59/Misc.16/Rev.3 (2001), *reprinted in* Compilation of General Comments, *supra* note 234, at 276-77.

319. *Id.* ¶¶ 6, 9, 13-17, 21, at 274-76.

320. *Id.* ¶¶ 11-12, 18, 22-24 & 33-34, at 276-77.

321. *Id.* ¶¶ 32, 36, at 277.

As for the Covenants, states are responsible for actions by their organs that fail to respect human rights.[322] Responsibility for failing to protect and fulfill rights will depend on a separate delict, usually an omission.

The Torture Committee, as referred to previously, is bound to a definition of torture that presupposes fairly direct attributability to the state. Torture is

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[323]

However, the state party also undertakes to prevent

> other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[324]

This can conceivably apply to punishment at the hands of actors who cannot, in the *Nicaragua* sense, be considered state actors to the extent that the state does not take adequate measures to protect, i.e. it effectively acquiesces in the treatment. This still requires a separate delict on the part of some state actor, i.e. by virtue of instigation, consent or acquiescence.

The Torture Committee in its early work focused predominantly on the duty of states to refrain from torture or inhuman, cruel or degrading punishment, i.e. the duty of state parties to respect human rights. However, in recent years, they have taken a greater interest in state responsibility to protect.

The majority of communications to the Torture Committee protest threatened or actual refoulement to face the risk of torture, which is prohibited by Article 3.[325] The second most common type of complaint concerns purported failures to investigate allegations of torture, in violation of Article 12.[326] Article 3 prohibits only refoulement "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Refoulement to lesser forms of cruel, inhuman or degrading treatment or punishment is not

322. *See, e.g., CAT, supra* note 231, arts. 1, 5, 16.

323. *Id.* art. 1(1).

324. *Id.* art. 16; *see also* Andrew Byrnes, *The Convention Against Torture, in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 183, 187 (Kelly D. Askin & Dorean M. Koenig, eds., 2000).

325. *See* U.N. Comm. Against Torture, *Report of the Committee Against Torture, Thirty-fifth & Thirty-sixth Sessions*, U.N. GAOR, 61st Sess., Supp. No. 44, ¶ 79, tbl. at 88-123, U.N. Doc. A/61/44 (May 19, 2006) [hereinafter Torture Committee 2006 Report].

326. *Id.*

explicitly precluded. Refoulement cases where the threat of mistreatment is not directly attributable to the state are more likely to reach the HRC, since the ICCPR also excludes torture, inhuman or degrading treatment or punishment.[327]

Any application of the responsibility to fulfill is difficult to reconcile with the subject matter of the treaty: how can one be "tortured" or subject to "punishment" without any culpability either at the hands of a state or private actor? One could theoretically conceive of certain chronic and painful health conditions which lead to extensive suffering in the absence of palliative care, but to define these as torture or as treatment or punishment would be to stretch the text, not to mention the object and purpose, of CAT. Article 1 requires that torture be inflicted "intentionally." Article 16 refers to other "acts" which are "committed" and amount to cruel, inhuman or degrading treatment or punishment. Inertia on the part of the state in the face of suffering which has no human cause is not covered by CAT. Thus, we must be content to witness the Torture Committee engage in twin duties to respect and protect human rights.

Concern about the behavior of state organs has constituted the bulk of the Torture Committee's work until recently. Examples include violence against prisoners, the conduct of police officers, investigation and remedies for alleged victims of torture, the use of evidence obtained from torture, and intimidation and harassment of human rights activists and legal professionals.[328] More, recently, however, CAT has expressed considerable interest in states' duties to protect their inhabitants, querying, inter alia, caste discrimination, violence and discrimination against Roma and foreigners, domestic violence and sexual violence against women, trafficking in persons, protection of domestic workers, violence against abandoned children, child abduction by non-state armed groups, and inter-prisoner violence.[329] State responsibility for these private wrongs exists by virtue of, and

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327. ICCPR, *supra* note 227, art. 7; *see, e.g.*, HRC, *Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, Communication 1234/2003, P.K. v. Canada*, U.N. Doc. CCPR/C/89/D/1234/2003, ¶¶ 4.3, 4.7 (April 3, 2007). The Canadian response in this communication indicated that in that state's view, there must be a separate delict on the part of the receiving state, i.e. inadequate due diligence in providing protection. As the communication was determined inadmissible, the HRC did not comment on this argument.

328. U.N. Comm. Against Torture, *Report of the Committee Against Torture, Nineteenth & Twentieth Sessions*, U.N. GAOR, 53rd Sess., Supp. No. 44, ¶¶ 49, 60-61, 64-65, 90, 116, 133, 143, 163, 176, 186, U.N. Doc. A/53/44 (Sept. 16, 1998) (considering reports issued by Cyprus, Arg., Switz., Cuba, Spain, Fr., Guat., N.Z., and F.R.G.); U.N. Comm. Against Torture, *Report of the Committee Against Torture, Twenty-first & Twenty-second Sessions*, U.N. GAOR, 54th Sess., Supp. No. 44, ¶ 45, U.N. Doc. A/54/44 (1999); U.N. Comm. Against Torture, *Report of the Committee Against Torture, Twenty-third & Twenty-fourth Session*, U.N. GAOR, 55th Sess., Supp. No. 44, ¶ 179, U.N. Doc. A/55/44 (2000).

329. U.N. Comm. Against Torture, *Report of the Committee Against Torture, Thirty-third Session & Thirty-fourth Session*, ¶¶ 39(g), 46(a), 46(a)(v), 47(c), 47(j), 47(k), 48(l), 83(o), 84(o), 93(h), 97(o), 108(m), 109(k), U.N. Doc. A/60/44 (2005) (considering reports issued by Arg., Greece, Alb., Uganda, and Bahr.); Torture Committee 2006 Report, *supra* note 325, ¶¶ 26(12), 26(14), 27(17), 29(26), 29(32) (considering reports from Dem. Rep. Congo, Ecuador, and Nepal); U.N. Comm. Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, Italy*, ¶¶ 21-23, U.N. Doc. CAT/C/ITA/CO/4 (July 16, 2007); U.N. Comm. Against Torture, *Consideration of Reports Submitted by State Parties*

only in the event of, inadequate efforts by the state to prevent, investigate and punish, i.e. a separate delict of failing to satisfy its positive obligations.[330]

C. Who is the State?

The various human rights treaties may award rights to individuals, but the obligations to guarantee those rights fall solely on states. The treaties, and their treaty bodies, do not inform us about the direct accountability of non-state actors.[331] Similarly, the ILC Articles are focused on state responsibility, to the exclusion of individual responsibility or, for that matter, responsibility of international organizations.[332] From the other side, in the event of a breach of a primary rule of international law (by a state), the ILC Articles advise us only of the remedies that other states may have.[333] Although the mandate of the ILC did not explicitly preclude the possibility of considering state responsibility *to* individuals or international organizations, it decided to concentrate only on state responsibility vis à vis other states.[334]

D. Obligations to whom?

Human rights are usually understood as obligations owed by states to individuals. The idea of "state responsibility" for human rights is usually thought of as state responsibility *to* the individuals with whom it interacts. Malcolm Evans argues that this is not really state responsibility at all, at least not in the proper international law sense.[335] Instead it is state responsibility "in the layman's sense" and as such "has little – if anything – to do with state responsibility as an aspect of international law and as now reflected in the ILC's Articles on State Responsibility."[336] This, he argues, is hardly surprising, since the whole notion of human rights is an anomaly in the Westphalian model on which the principles of state responsibility are founded.[337] Evans goes so far as to argue that human rights might be more "aspirational" or "ethical" as opposed to "legal" claims in international law and that this (in part) explains the modest mechanisms designed to monitor their implementation–centering on assisting and encouraging compliance rather than enforcing or penalizing non-compliance.[338]

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under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, Japan, ¶ 24, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 3, 2007).

330. Evans, *supra* note 250, at 150-51.

331. *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 32 (2006) (discussing objections to the concept that non-state actors have duties under human rights laws).

332. *See* ILC Articles, *supra* note 4.

333. *Id.* art. 42, at 54.

334. *Id.* art. 33(2), at 51; *see* Ago: Second Report 1970, *supra* note 120, ¶¶ 5, 22, 23, at 178, 184. *See generally* Daniel Bodansky, John R. Crook & Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 809-11 (2002) (questioning the wisdom of the scope of the ILC Articles); Daniel Bodansky, John R. Crook & James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 886-88 (2002) (reply by the authors).

335. Evans, *supra* note 250, at 139.

336. *Id.*

337. *Id.* at 140.

338. *Id.* at 146-49; *but see* Theodor Meron, *State Responsibility for Violations of Human Rights*, 83

State responsibility to individuals is undoubtedly a central element of human rights law, but it is one which is quite outside the ILC Articles, which indicates only that the Articles are "without prejudice" to such responsibility.[339] Similarly, the Articles only advise us as to the recourse that might be had by other states to human rights violations.[340]

What is immediately apparent with regard to the human rights treaties is that it will be very rare indeed for another state to be "injured" by a violation. Thus the rules of recourse for injured states under the ILC Articles will seldom be relevant.[341] Unfortunately, although recognizing the interests of third states (non-injured states), the ILC Articles were left deliberately vague with regard to what circumstances they might invoke responsibility and what they might do about it. Article 48 of the ILC Articles advises us that "[a]ny State other than an injured State" can invoke responsibility if: "(a) The obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole."[342]

The two subsections indicate the difference between (a) obligations *erga omnes partes* and (b) obligations *erga omnes*. In the former case, one would have to argue that human rights are the "collective interest" of all parties to the human rights treaty concerned, i.e. each state party has a relevant interest in compliance by every other state.[343] The latter indicates an *erga omnes* obligation, an obligation owed to the entire international community. The deliberate use by the ILC of "international community" rather than "international community of states" should be noted. But an obligation *erga omnes* (as opposed to *erga omnes partes*) is a matter of customary international law.[344] Some human rights obligations may well be customary international law, even *erga omnes*, and these may have their origins in the human rights treaties. However, if a state wishes to rely on the *erga omnes* character of a norm, then it is in fact relying on the customary international law nature of that norm, not the treaty from which that norm originally emanated. State invocation of the responsibility of another state *for violation of a treaty norm* must depend on the obligation being characterized as *erga omnes partes*.[345]

AM. SOC'Y INT'L L. PROC. 372, 372-73 (1989).

339. ILC Articles, *supra* note 4, art. 33(2), at 51.

340. *Id.* art. 48, at 56.

341. *Id.* art. 42, at 54.

342. *Id.* art. 48, at 56; *see also id.* art. 54, at 58. *See generally* Bodansky, Crook & Weiss, *supra* note 334, at 799-805 (discussing the differences between ILC Articles 42 and 48).

343. ILC Articles, *supra* note 4, cmt. to art. 48 ¶ 7, at 320-21. A "common interest" is sufficient; there need not be a direct benefit for the invoking state; regional human rights treaties are provided by way of example.

344. *Id.* cmt. to art. 48 ¶ 6, at 320. Obligations *erga omnes partes* can also arise from customary international law, but are possible from treaty.

345. *See* Nicaragua, *supra* note 2, ¶ 178, at 95.

General Comment No. 31 of the HRC is unclear about this:

> While article 2 is couched in terms of the obligations of State parties towards individuals as the right-holders under the Covenant, every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the "rules concerning the basic rights of the human person" are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.

The Committee immediately adds: "Furthermore, the contractual dimension of the treaty involves any State party to a treaty being obligated to every other State party to comply with its undertakings under the treaty."[346]

In the first extract, the HRC must be referring to customary international law and, of course, the Charter. To this extent, it is not actually a matter for the HRC at all because it is not a question of supervision of the treaty. The second extract indicates that the HRC views the ICCPR as creating obligations *erga omnes partes*. Article 41, which allows for states to raise concerns regarding the (non-) performance by other state parties, must only apply to the latter.

Under ILC Article 48, states can seek limited remedies, namely, (a) cessation of the breach and assurances of non-repetition; and (b) reparation in the interests of the injured state or other beneficiary (*e.g.* individual whose human rights have been violated). They cannot seek compensation as they have not suffered loss.[347]

The section on counter-measures in the ILC Articles was one of the most controversial and the vagueness to be found therein is evidently the result of trying to reach a text that the maximum number of experts – and states – could agree upon. The rights of non-injured states to take countermeasures are not explained. Only states' rights to take "lawful measures" are explained, although the content of "lawful measures" is not otherwise defined.[348] Practice is described by the ILC as "limited and rather embryonic."[349]

Nevertheless, the answer to the question: "has state X breached its obligation under Treaty Y?" does not depend upon to whom the obligation is owed. The obligation (a primary rule) has either been breached or it has not. The person, injured state, or non-injured state seeking redress will be relevant to the available remedies, but does not change the answer to the question of whether the primary rule has been respected or not.

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346. HRC, *General Comment No. 31*, *supra* note 252, ¶ 2 at 233.

347. ILC Articles, *supra* note 4, art. 48, at 56 (a state suffering loss is instead an "injured state").

348. *Id.* art. 54, at 58. *See* CRAWFORD, *supra* note 92, at 49, 56. *See generally* Bodansky, Crook & Crawford, *supra* note 334, at 884-85. On the use of the term "measures" rather than "counter-measures", *see* Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127, 1143; Xue Hanqin, *The State of State Responsibility*, 96 AM. SOC'Y INT'L L. PROC., 172, 172-76 (2002) (remarks by the author discussing the danger of vagueness).

349. ILC Articles, *supra* note 4, cmt. to art. 54, ¶ 3, at 351.

However, the identification of the state remains a matter of secondary rules; for whose conduct (or omissions) is the state responsible? The answer to this question, according to the treaty bodies, is compatible with the ILC Articles 4 and 8, and the findings of the Court in *Nicaragua* and the Genocide Convention case.

E. Who is the State that must "respect, protect and fulfill"?

The obligation to respect, protect and fulfill human rights falls, according to the treaty bodies, on states and not on private actors. State responsibility to respect human rights is engaged where a state actor – identifiable in accordance with *Nicaragua* has behaved in such a way as to violate an enumerated human right. Responsibility to protect and fulfill human rights may be triggered by the actions of some non-state actors, but the responsibility of the state depends always on a separate delict – i.e. something done or, more commonly, not done by the state, as classically defined.[350]

The treaties impose positive obligations on states; refraining from action is inadequate for their implementation. Those positive obligations are subject to the standards of due diligence.[351] The actual requirements on states, that is, the degree of diligence due, is a matter of the primary rules, not the secondary rules of state responsibility which only come into play once it can be established that the primary rules have been breached. That is to say, the rules of state responsibility are relevant once it can be said that the state has *not* acted with due diligence.

Related, and also pertaining to the primary rules, is the matter of fault.[352] In some cases, particularly cases of negative obligations (such as obligations to respect human rights), a state actor must be identified as having been at fault.[353] On the other hand, in cases of positive obligations (such as obligations to protect and to fulfill), responsibility does not depend on identifying any particular state organ or agent that acted or failed to act in a particular way (i.e. subjective fault), but depends on an overall failure (i.e. objective fault).[354]

In all cases, it is not enough that an individual not enjoy their human rights for the state to be held responsible under the treaties. A woman may be beaten by her partner, but the state only bears responsibility if it has an inadequate police and criminal justice response or if it tolerates and makes no effort to reform a cultural environment that considers spousal abuse a right of men. She may die in childbirth but the state is only in violation of her right to life or right to health if it has not, in light of its degree of economic development, provided adequate antenatal, birth and post-partum services.

Theodor Meron has described the law of state responsibility as terra incognita for human rights lawyers, a theme that Dominic McGoldrick adopts to review

350. Evans, *supra* note 250, at 150-51.

351. *See* Pisillo-Mazzeschi, *supra* note 100, at 44-45.

352. ILC Articles, *supra* note 4, cmt. to art. 2, ¶¶ 3, 10, at 69-70, 73; *see* CRAWFORD, *supra* note 92, at 13.

353. *See* Pisillo-Mazzeschi, *supra* note 100, at 26.

354. *See supra* text accompanying notes 101-05.

whether or not the HRC applies state responsibility in the classical sense.[355] McGoldrick's conclusion is that "[i]nternational human rights lawyers...have really been operationalising the principles of State responsibility all of the time."[356] The application by the treaty bodies, some wittingly, some impliedly, of the tertiary model is in harmony with the classical doctrine.

The content of the obligations whether to respect or whether to protect or fulfill, and if so, to what extent – is a matter of the primary rules; but the act or omission which gives rise to responsibility of the state is an act or omission of a state organ as traditionally understood. There is no implied guarantee of the conduct of non-state actors;[357] instead there is only an explicit guarantee that the state will take particular steps, the content of which is defined and refined by the work of the treaty bodies.

The treaty bodies could perhaps assist clarity in this matter with a more concerted focus on what they mean by "responsibility" so as to reduce confusion. It must be recalled that membership of the treaty bodies is not restricted to those with a legal education, and less still, specialists in international law. Nor is it even desirable that membership be so restricted: legal fluency should not be prioritized over, for example, experience of children's welfare, psychology and development in the Children's Committee; nor should experts in the psychology and physiology of torture victims be precluded from the Torture Committee in favor of more lawyers. Nevertheless, lawyers are on the treaty bodies, and they might encourage a more legalistic use of the language of responsibility.[358]

V. CHORALE OR CACOPHONY

This paper is specifically about *state* responsibility, so the author has not inquired about the direct international responsibility of non-state actors, such as *génocidaires*, terrorists or private violators of human rights. Rules of personal accountability in international law do not alter the question of state responsibility, as both can exist together.

A. Who is the State?

The Court, the Council and the treaty bodies all operate relatively autonomously of one another in the broader institutional framework of the United Nations. Nevertheless, state responsibility in all three cases depends on the identification of the organs and agents of the state for whose actions and omissions the state can be held accountable.

Under the Genocide Convention, state parties have mostly negative duties: duties to refrain from committing genocide, conspiring to commit genocide, inciting genocide, attempting to commit genocide and being complicit in

355. Meron, *supra* note 338, at 372; McGoldrick, *supra* note 253, at 162.

356. McGoldrick, *supra* note 253, at 199.

357. *See* Caron, *supra* note 10, at 127; *see also infra* text accompanying note 392.

358. Lawyers, around half of whom are specialists in international law, make up the vast majority of the HRC, but do not enjoy the same dominance in the other treaty bodies. All the treaty bodies, however, have some experts in international law.

genocide.[359] State responsibility for any of these actions will depend upon evidence of them having been undertaken by an agent of the state; either a de jure organ or an organ de facto, by virtue of complete dependence; or a person or group considered an agent by virtue of effective control over the relevant operation.[360]

States also have positive obligations under the Genocide Convention to prevent and punish genocide.[361] For the state to be considered in breach of these obligations it is not necessary to show that any particular state organ or agent has failed, but just that there has been an overall failure.[362] The relevant point is that *no* state organ or agent has taken the required steps. They have not exercised due diligence. The state will not be held responsible for any genocide or attempted genocide that follows their inaction or ineptitude, but only for the separate delict of their failure to intervene.[363]

Counter-terrorism obligations on states likewise have positive and negative aspects. A state must refrain from "organizing, instigating, assisting or participating" in terrorism outside of its own borders.[364] State responsibility will once more depend upon the attribution of any of these behaviors to the state identified per *Nicaragua* as de jure organs, de facto organs or agents by virtue of effective control over specific operations.[365] The state is responsible for any attack it undertakes itself. Its responsibility for organizing, instigating or assisting is, however, responsibility for its participation, *not* for the terrorist attacks that may result. This responsibility is engaged even if no terrorist attack follows.

States also have positive duties to prevent terrorism and, following the 2001 attacks, these are stricter and more precise.[366] Responsibility, similarly to the duty to prevent and punish genocide, hinges upon a separate delict – the inadequacy of the state's efforts, or efforts below the threshold of due diligence. No state organ has taken adequate measures. The state is responsible for its failure, for its separate delict, but not for the terrorist attacks that follow and will be responsible even in the absence of an actual terrorist attack.

There is an argument that can be made that states taking inadequate measures, i.e. not meeting the requirements of due diligence, should be held directly responsible for any resulting terrorist attacks. This would indicate a dramatic shift in the secondary rules of state responsibility and whilst it may be reflected in some recent opinio juris, it cannot be established from the Council resolutions.[367]

International human rights law imposes both positive and negative obligations on states. They have negative duties to refrain from certain behaviors to ensure

359. Genocide Convention, *supra* note 17, art. 3.

360. *See supra* text accompanying notes 30-79.

361. Genocide Convention, *supra* note 17, art. 1.

362. Genocide Convention case, *supra* note 1, ¶¶ 430-31, at 294-95.

363. *See supra* text accompanying notes 80-104.

364. Friendly Relations Declaration, *supra* note 128, paras. 8-9 (1st princ.).

365. *See supra* text accompanying note 196-97; *see also supra* text accompanying notes 32-34; *see also* Genocide Convention case, *supra* note 1, ¶¶ 385-93.

366. *See supra* text accompanying notes 201-11.

367. *See supra* text accompanying notes 212-19.

respect for human rights. State parties to the relevant treaties may not, for example, torture, detain indefinitely without trial, forbid women from paid employment or execute minors.[368] State responsibility for violation of these obligations requires the involvement of a person or organ considered an organ of the state per *Nicaragua*.[369]

State responsibility for violation of positive duties, on the other hand, does not require the identification of a particular state organ at fault; it is the fact that no state organ has taken the requisite steps that is pertinent.[370] These are obligations of due diligence. Infringement may depend on the actions of a non-state actor, such as the duty to prevent violence within the family or trafficking.[371] On the other hand, for some violations it will not be necessary to demonstrate any individual wrongdoer. The state can be responsible for high rates of maternal mortality, extensive unemployment, low rates of formal education, and even anorexia.[372] State responsibility is not for the injury itself, but for its failure to exercise due care and attention in its prevention, and/or inquiry and punishment into its violation. In the case of anorexia, it is not the illness itself for which the state is responsible but for its separate delict in not taking adequate measures to reduce its incidence, for example, by educating young persons and monitoring media and cultural influence.[373]

In all three examples of positive measures, pertaining to genocide, counter-terrorism and human rights, state responsibility depends upon a separate delict and that separate delict can be most simply understood as "not trying hard enough." The determination of what constitutes "trying hard enough" is a matter of the primary rules.

One further point to note is that positive obligations can be contracted out. The state need not do everything itself. It is important that they are fulfilled; it is less important by whom. In each example considered here, with admittedly greater and lesser probability, the state could engage a private contractor to undertake the duties. A state could hire a private force to arrest persons suspected of involvement in genocide; it might pay a for-profit company to create and enforce rules for financial institutions to reduce the likelihood of funds reaching terrorists; it can similarly pay corporations to provide healthcare services. If these private contractors fail, responsibility will fall back upon the state for not having obtained

368. CAT, *supra* note 231, arts. 1, 2; ICCPR, *supra* note 227, arts. 6(5), 7, 9; ICESCR, *supra* note 228, arts. 3, 6-7; CEDAW, *supra* note 230, art. 11; CRC, *supra* note 232, art. 37.

369. *See supra* text accompanying note 350.

370. *See supra* text accompanying note 102; *see also* Genocide Convention case, *supra* note 1, ¶ 429.

371. ICCPR, *supra* note 227, arts. 8, 12, 23; ICESCR, *supra* note 228, art. 12; CAT, *supra* note 231, art. 16; CRC, *supra* note 232, arts. 11, 19, 32, 34-35; MWC, *supra* note 233, arts. 11, 16.

372. ICESCR, *supra* note 228, arts. 6, 12-14; CRC, *supra* note 232, arts. 24, 28-29; MWC, *supra* note 233, art. 30; *see also* U.N. Comm. on the Rights of the Child, *Report of the Committee on the Rights of the Child, Twenty-seventh Session*, ¶ 68, U.N. Doc. CRC/C/108 (July 23, 2001); U.N. Comm. on the Rights of the Child, *Report of the Committee on the Rights of the Child, Twenty-fourth Session*, ¶ 245, U.N. Doc. CRC/C/97 (July 17, 2000).

373. CRC, *supra* note 232, art. 17.

more able contractors or not undertaking the tasks itself; the state's positive obligations have not been fulfilled. On the other hand, should the contractors violate negative obligations (such as the duty to respect human rights or to refrain from violating the sovereignty of another state), states will bear responsibility, even in the absence of effective control, if the contractors exercise "elements of governmental authority." The ILC acknowledges the imprecision of this latter term and considers it a somewhat contextual standard which will vary between states.[374]

B. What Does This Mean for State Responsibility?

This has assumed so far that the positive or negative aspect of states' duties can be easily identified. In practice, however, as has long been recognized in the realm of human rights law, the distinction between positive and negative obligations is not straightforward.[375] This can be illustrated by the example of the right to life. The ICCPR informs us that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[376] Textual, contextual or object and purpose interpretations of this article all yield the same conclusion: state parties have both negative and positive obligations under this article. The negative duties include refraining from arbitrary execution or reckless killing by state organs or agents and restraint in the use of the death penalty within the criminal justice system.[377] The positive duties (to protect) include operating a functional legal system to prevent private killing[378] and duties to fulfill the right to life for vulnerable members.[379] In this latter context, the HRC considers it "desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy...."[380] Responsibility will be engaged in the event of failure by the appropriate institutions.[381] This might include tolerance of domestic murders displayed by poor investigation and lower sentencing of offenders; or a refusal to investigate fully allegations of murder and disappearances of political activists which have taken place without proven links to state organs.[382] Responsibility can also be engaged if the state simply does not maintain the necessary institutions, such as police services, prosecutors and court officials to provide the requisite level of

374. *See* ILC Articles, *supra* note 4, art. 5, cmt. to art. 5 ¶¶ 5-6, at 92, 94; *see also* Marina Spinedi, *La Responsabilità dello Stato per Comportamenti di Private Contractors*, in LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI, *supra* note 37, at 67, 99-103.

375. *See supra* text accompanying note 280.

376. ICCPR, *supra* note 227, art. 6.

377. *Id.*; *see also* HRC, *General Comment No. 6: Article 6 (Right to life)* ¶¶ 3, 6-7, *reprinted in* Compilation of General Comments, *supra* note 234, at 167.

378. ICCPR, *supra* note 227, art. 6.

379. *See, e.g.*, MWC, *supra* note 233, pmbl., arts. 9-10; *see also* CRC, *supra* note 232, pmbl., arts. 2, 6.

380. HRC, *General Comment No. 6*, *supra* note 377, ¶ 5, at 167.

381. *See* ECOSOC, *General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* ¶¶ 1-6, 10, *reprinted in* Compilation of General Comments, *supra* note 234, at 15-17.

382. HRC, *General Comment No. 6*, *supra* note 377, ¶ 4, at 167.

protection, or inadequate or non-existent health services and guarantees of nutrition for the poorest members of the state.[383]

The character of an obligation as positive or negative is part of the primary rules and thus not part of the law of state responsibility. However, as the discussion above demonstrates, the characterization of an obligation as positive or negative has a crucial impact on the rules of state responsibility, in particular, whether an organ or agent of the state needs to be identified at all.

These three distinct areas of international law examined, and the institutions that have worked with them, contain very different primary rules, in particular, very different expectations about the positive obligations of states. The standards required, or the degree of diligence due, depend on primary rules. However, ultimately, the secondary rules of state responsibility are the same.

The distinction between primary and secondary rules was introduced by Ago and is defended by Crawford, the rapporteur who saw the conclusion of the ILC Articles as "provid[ing] the key to their completion as well as their scope. It may be supported by a number of reasons, principled as well as pragmatic."[384] He describes this distinction as "indispensable" to the conclusion of the ILC's project because primary rules, including rules about the content of obligations and requirements of fault, are in a constant state of flux and negotiation.[385] The pace at which the primary obligations of states pertaining to counter-terrorism have changed bears out this concern. The ILC's concentration on state responsibility is an exposition of the "underlying structures," which are "less fluid, more durable."[386] Indeed, the ILC would have come in for considerable criticism if, after decades of laborious negotiations, they had concluded a draft which would become obsolete in a few years. The distinction between primary and secondary rules was also recognized by the Court, even before the conclusion of the ILC's second reading.[387]

Nevertheless, the distinction between primary and secondary rules has not been without its critics. For example, Bodansky and Crook argue that the distinction is artificial and potentially misleading.[388] David Caron laments the resulting abstract nature of secondary rules which makes it "quite complex to translate these articles to the real world of dispute resolution."[389] Crawford acknowledges that it is a rare dispute that concerns only secondary rules in which

383. For further discussion of this and other examples, see Scott & Macklem, *supra* note 280, 48-71.

384. Bodansky, Crook & Crawford, *supra* note 334, at 877.

385. CRAWFORD, *supra* note 92, at 15.

386. *Id.*

387. *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, ¶ 47, at 38 (Sept. 25); Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 773-74 (2002).

388. Bodansky & Crook, *supra* note 387, at 780-81.

389. David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857, 870-72 (2002).

breach of the primary rules is acknowledged; instead, real world disputes contain elements of both.[390]

The three examples considered do seem to suggest that whilst state responsibility can be understood in the abstract as an academic concept, its application (and hence, perhaps, its usefulness) will require an extensive examination of the primary rules in every case. This becomes even more problematic when the difficulties of distinguishing positive and negative obligations are taken into account.

Crawford explains the status quo thus:

> Whatever the range of state obligation in international law, the ways of identifying the state for the purposes of determining breach appear to be common...Rarely (and never, as far as I am aware, by implication) is the state taken to have guaranteed the conduct of its nationals or of other persons on its territory, even when it has entered into obligations in completely general terms. The rules of attribution are thus an implicit basis of all international obligations so far as the state is concerned.[391]

David Caron warns against extending the responsibility of the state to make it a guarantor for all operations within its territory:

> If the State were responsible [for all wrongful acts within its jurisdiction], then it would assume the position of insurer of the victim in a myriad of cases. If the State were responsible, the rule would encourage greater control by the State of persons and entities within its jurisdiction – a possibility we should consider with care.[392]

In fact, despite Derek Jinks' concerns to the contrary, it appears that the secondary rules of international have held fast.[393] The state does not "insure" potential victims against the behavior of the persons, natural and legal, operating within its jurisdiction. Even where primary rules change, by slow evolution in the case of human rights or by a sudden jolt in the case of counter-terrorism, the rules of state responsibility remain the same. States may accept positive duties, by virtue of treaty, through acquiescence to developments in customary international law, or, more controversially, by acceptance of Council resolutions. The coming years may bear witness to further stresses on these norms, particularly in the area of counter-terrorism, but for now, the ILC Articles accurately describe the applicable framework. Ultimately, these three institutions, the Court, the Council and the committees, connected to one another by the loosest of threads, are performing in the same key.

390. CRAWFORD, *supra* note 92, at 9.

391. Bodansky, Crook & Crawford, *supra* note 334, at 878-79.

392. Caron, *supra* note 10, at 127.

393. Jinks, *supra* note 132, at 83-84.

SOLDIERS OF FORTUNE – HOLDING PRIVATE SECURITY CONTRACTORS ACCOUNTABLE: THE ALIEN TORT CLAIMS ACT AND ITS POTENTIAL APPLICATION TO *ABTAN, ET AL. V. BLACKWATER LODGE AND TRAINING CENTER, INC., ET AL.*

Matthew C. Dahl[1]

Private security contractors play a prominent role in modern military operations. Of course the use of paid forces is not a new concept. Militaries utilized paid forces for hundreds of years, but technological advances have increased the mobility and firepower of private security contractors.[2] The United States now relies heavily on the private military industry in conducting its worldwide military operations.[3] The U.S. used private security contractors to conduct narcotics intervention operations in Columbia in the 1990's.[4] During the conflict in the Balkans, the U.S. used a private security contractor to train Croat troops to conduct operations against Serbian troops.[5] Contracting out these operations allowed the U.S. to decrease its footprint in these conflicts, or leave no footprint at all. Today the U.S. has as many as 30,000 private security contractors in Iraq.[6] However, repeated reports of misconduct by private security contractors are making the industry endure a level of scrutiny never encountered before. This note will focus on the Alien Tort Claims Act (ATCA) as a civil remedy to the misconduct by private security contractors overseas and how the case law regarding the ATCA will affect the recent lawsuit brought in the case of *Abtan v. Blackwater*.[7]

I. THE TREND TOWARD USING PRIVATE MILITARY COMPANIES

Governments use private security contractors for both practical and political reasons. Private military companies provide a wide range of services from training

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2. E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 221, 234-35 (2008).

3. JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY xxi-xxii (Nation Books 2007) (discussing the rising size and reliance on private contractors and the government's inability to monitor them).

4. Gaston, *supra* note 2, at 235-36.

5. *Id.* at 236.

6. Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH POST, June 16, 2007, at A1.

7. Abtan v. Blackwater, No. 1:07-cv-01831 (D.D.C. second amended complaint filed Mar. 28, 2008) *available at* http://ccrjustice.org/files/3.28.08%20Abtan%20Second%20Amended%20Complaint.pdf.

to post-conflict/reconstruction support to direct military support.[8] On the practical side, using private security contractors allows the military to delegate certain functions it would normally have to perform on its own. This delegation allows the military to focus its forces on higher priority issues.[9] From a political perspective, using private security contractors allows countries to circumvent governmental regulations on how many troops they can send into a conflict area.[10] Governments also benefit politically by utilizing private security contractors because public opinion is less affected by the injury or death of a contractor than an enlisted soldier.[11]

Private security contractors are used in conflicts of all sizes. Governments all around the world are trending towards outsourcing military and security functions to these private security contractors.[12] Today, several hundred private security firms exist around the world and have a combined annual revenue of $100 billion.[13] Countries in Africa used them in small scale regional conflicts. For example, the government of Sierra Leone hired the South African private security firm Executive Outcomes to conduct direct military operations against a rebel group that took control of major diamond mines in the country.[14]

The U.S. continues to use them in the larger scale conflicts in Iraq and Afghanistan.[15] Approximately 100,000 contractors are present in Iraq and a significant number of them are security contractors.[16] This number is ten times the number of contractors used by the U.S. in the first Persian Gulf War, and is almost equal to the number of active duty military personnel in Iraq.[17]

The U.S. is growing increasingly more reliant on private security contractors in its operations in Iraq. A 2007 House of Representatives memorandum noted that as of March 2006, 181 private security firms operated in Iraq, employing

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8. *See, e.g.*, MPRI, International Security Sector Training and Education, http://www.mpri.com/main/internationalsecuritysectort.html (last visited Oct. 4, 2008) *and* Blackwater Worldwide, http://www.blackwaterusa.com/company_profile/comp_history.html (last visited Oct. 4, 2008).

9. Bryan Terry, Note, *Private Attorneys General v. "War Profiteers": Applying the False Claims Act to Private Security Contractors in Iraq*, 30 SEATTLE U. L. REV. 809, 819 (2007).

10. Gaston, *supra* note 2, at 235-36 (discussing how the United States used Private security contractors in Colombia to stay under congressionally set troop limits).

11. *Id.* at 235.

12. *Id.* at 224.

13. Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contract Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 365, 371 (2006).

14. *Id.* at 369.

15. Gaston, *supra* note 2, at 223.

16. Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 4, 2006, at D1. *See also* Rakowsky, *supra* note 13, at 370.

17. STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM, ADDITIONAL INFORMATION FOR HEARING ON PRIVATE SECURITY CONTRACTORS, at 2 (Feb. 7, 2007), *available at* http://oversight.house.gov/documents/20070207112331-22533.pdf. [hereinafter PRIVATE SECURITY CONTRACTORS MEMORANDUM]

48,000 employees.[18] During the reconstruction period in Iraq, the U.S. has spent $3.8 billion on security contractors.[19] Salaries for employees of these contractors can get as high as $33,000 a month.[20] These numbers account for 12.5% of U.S. government spending on reconstruction in Iraq.[21] Notwithstanding this large government expenditure on private security contractors, numerous reports of contractors' misconduct have surfaced while no legal restraints exist to control them.[22]

II. BLACKWATER

While hundreds of private security contractors are operating today, this article focuses on just one – Blackwater Worldwide ("Blackwater"). Blackwater is a major private security contractor used by the United States in Iraq, yet it remains controversial due to reports of misconduct by its employees.[23] Blackwater's alleged misconduct in Baghdad in 2007 led to the lawsuit *Abtan v. Blackwater*.[24]

Blackwater was founded by Erik Prince – a former Navy SEAL – on December 26, 1996.[25] The idea arose from of a perceived need to offer privatized training for military and law enforcement.[26] In an effort to fulfill this need, Prince purchased 5,000 acres of land in eastern North Carolina for approximately $1.3 million to create the Blackwater campus.[27] Through its first few years Blackwater's business and reputation grew rapidly as a facility offering tactical training for all kinds of government officials.[28] However, the September 11th attacks and the subsequent "War on Terror" changed Blackwater into a major player in the private security industry when it received $5.4 million to guard the CIA's station in Kabul, Afghanistan.[29] Blackwater's role continued to grow and it now has more than $500 million in government contracts.[30]

Blackwater's operations as a government contractor came under intense scrutiny after an incident at al-Nisoor Square in Baghdad on September 16, 2007.[31] While investigations are still ongoing, the allegations are that unprovoked

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18. *Id.* There were 140,000 U.S. troops in Iraq in 2006 and 100,000 contractors. Of the major security contractors there were 1,500 from DynCorp, 1,000 from Blackwater, 500 from MPRI, and 6,500 from Titan. Merle, *supra* note 16.

19. PRIVATE SECURITY CONTRACTORS MEMORANDUM, *supra* note 17, at 2

20. *Id.*

21. *Id.*

22. *Id.* at 3.

23. *See, e.g.*, Gaston, *supra* note 2, at 229-30.

24. Abtan v. Blackwater, No. 1:07-cv-01831 (D.D.C. second amended complaint filed Mar. 28, 2008).

25. SCAHILL, *supra* note 3, at 32.

26. *Id.* at 25-26.

27. *Id.* at 32.

28. *Id.* at 34.

29. *Id.* at 45.

30. *Id.* at xix.

31. Mark Apuzzo and Lara Jakes Jordan, *FBI Finds Blackwater Trucks Patched*, ABC NEWS, Jan. 13, 2008, http://abcnews.go.com/Politics/WireStory?id=4125132&page=1 (last visited Oct. 4, 2008).

Blackwater contractors opened fire in a crowded square in Baghdad.[32] The incident resulted in the death of eleven Iraqi civilians and injuries to fourteen.[33] The attack prompted a full governmental investigation into the actions of Blackwater and other security contractors employed by the U.S. government. A memorandum sent out to the House Committee on Oversight and Government Reform reported that internal reports from Blackwater documented 437 incidents in which Blackwater contractors fired their weapons.[34] The reports showed that from January 1 to September 12, 2005, Blackwater engaged in 195 shooting incidents and 163 of those times, Blackwater personnel were the ones who fired first.[35] The reports suggested that the incidents resulted in 16 Iraqi civilian casualties and 162 incidents in which property of Iraqi civilians was damaged.[36]

III. THE ALIEN TORT CLAIMS ACT (ATCA)

The Alien Tort Claims Act was passed in 1789 as a means by which citizens of other countries could bring tort actions in the federal district courts of the United States.[37] While the ATCA was passed over two hundred years ago, its use was limited until around 1980.[38] In 1980, the Second Circuit handed down its decision in *Filartiga v. Pena-Irala* and reintroduced the ATCA as a way to hold actors responsible for their actions even though those actions may have taken place on foreign soil.[39] The *Filartiga* decision recognized a three-part test – 1) an alien 2) must allege a tort 3) committed in violation of the law of nations or a U.S. treaty – in order to bring a suit based on the ATCA.[40] The Second Circuit found for the plaintiffs in *Filartiga* and held that the ATCA grants jurisdiction for U.S. federal courts over torts identified under international law.[41]

The *Filartiga* decision marked the beginning of the federal courts' interpretation and expansion of the reach of the ATCA. Courts later held that individuals, not just sovereign states, could be liable under the ATCA.[42] The courts expressed willingness to construe the ATCA so that: 1) individuals could be held liable under the ATCA for crimes that they commit in furtherance of genocide or war crimes;[43] 2) groups of individuals who are not States, but nonetheless

32. *Abtan*, No. 1:07-cv-01831 at 3.

33. STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM, ADDITIONAL NFORMATION ABOUT BLACKWATER USA, at 6 (OCT. 1, 2007), *available at:* http://oversight.house.gov/documents/20071001121609.pdf [hereinafter BLACKWATER MEMORANDUM]

34. *Id.*

35. *Id.*

36. *Id.* at 7.

37. 28 U.S.C. § 1350 (1992).

38. Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 339 (2003).

39. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

40. Garmon, *supra* note 38, at 339 (citing *Filartiga*, 630 F.2d at 887).

41. *Id.* at 340 (citing *Filartiga*, 630 F.2d at 885).

42. *Id.* at 340-43.

43. *Id.* at 341-42 (citing Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)).

violate international laws;[44] and 3) corporations that work with States to violate international law.[45] The courts also recognized secondary liability as a mechanism to bring parties under the umbrella of the ATCA.[46] This secondary liability theory implicates any actor that "knowingly" aids others by "directly and substantially affecting the commission of [a] crime [violating international law]."[47] Another theory upheld by federal courts that imputes liability under the ATCA is the "joint action" theory.[48] The Southern District of New York said ATCA liability existed under the "joint action" theory if the plaintiff could prove that an individual willfully participated in actions with a State actor to violate international law.[49]

Federal courts recognize ATCA liability under the theories listed above. In the next section the facts and law of four cases will be analyzed to show how the federal courts construe liability under the ATCA. After that the analyses of those cases will be applied to show how the ATCA can be used in the pending case of *Abtan v. Blackwater* and in potential future cases.

A. Filartiga v. Pena-Irala: The Modern Interpretation of the ATCA

The suit in *Filartiga* was brought by a doctor in Paraguay whose son was tortured and killed because Dr. Filartiga was a political activist who opposed the government in Paraguay at the time.[50] Following unsuccessful attempts to prosecute Pena-Irala (the man alleged to have tortured and killed Dr. Filartiga's son) in Paraguay, Dr. Filartiga's daughter, Dolly, found Pena-Irala living in New York City and had him arrested by the INS.[51] While Pena-Irala was being held in the United States, the Filartigas filed a complaint in federal court alleging wrongful death and seeking damages in the amount of $10,000,000.[52] The federal court for the Eastern District of New York dismissed the case based on lack of subject matter jurisdiction, but the Second Circuit Court of Appeals upheld jurisdiction based on the ATCA.[53]

The court analyzed the question of whether the ATCA applied to this suit on two levels. At the first level the court asked whether Pena-Irala's actions violated the "law of nations." A violation of the "law of nations" is a requirement to trigger application of the ATCA.[54] The court answered this question by finding that torture is unequivocally banned by international law; therefore, Pena-Irala's actions fell under the ATCA.[55] At the second level, the court analyzed whether a

44. *Id.* at 342 (citing Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001)).

45. *Id.* at 342-43 (citing Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)).

46. *Id.* at 345-49.

47. *Id.* at 346 (citing Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)).

48. *Id.* at 349-50.

49. *Id.* at 349-50 (citing Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002)).

50. *Filartiga*, 630 F.2d at 878.

51. *Id.* at 878-79.

52. *Id.* at 879.

53. *Id.* at 880.

54. *Id.* at 880 (citing 28 U.S.C. § 1350).

55. *Id.* at 881. It is important to note that the court considered Pena-Irala's actions to be actions by the state of Paraguay and not as an individual. (The Second Circuit mentions the *states* "power to

court in the United States was constitutionally authorized to hear a case based on the violation of international law.[56]

The Second Circuit noted that the actions complained of in this suit did not violate a treaty of the United States,[57] but that in the absence of a violation of a treaty the court must also look to the "customs and usages of civilized nations" in determining what actions may violate the law of nations.[58] Furthermore, the law that is broken must be universally condemned by civilized nations and not simply one which one country may find immoral.[59] Without that distinction, countries could try to impose their own moral standards on other countries when the standards of those other countries are merely different and not necessarily universally abhorrent. However, the court quickly distinguished torture as universally condemned by the international community.[60] Given that Pena-Irala was charged with torture, and the court determined torture to be universally condemned by the international community, Pena-Irala's actions constituted a breach of the law of nations which triggered the use of the ATCA in his case.

Next, the court analyzed whether a court in the United States was constitutionally authorized to hear a case based on the violation of international law. The court pointed out that the first Judiciary Act of 1789[61] conferred federal jurisdiction to cases involving aliens bringing claims alleging violation of international law.[62] Additionally, the court reasoned that the common law of the United States was based partly on international law and thus incorporated international law into the national common law.[63] At one point, Pena-Irala made an argument that the law of nations is only a part of the law of the United States insofar as Congress has explicitly defined it.[64] However, at this point, the court made its clearest statement regarding the scope and meaning of the ATCA: "we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the

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torture persons held in its custody" and the *state's* "treatment of its own citizens.")

56. *Id.* at 885 (Pena-Irala argued that Article III did not confer federal jurisdiction to violations of international law).

57. *Id.* at 880.

58. *Id.* at 880-81 (citing The Paquete Habana, 175 U.S. 677 (1900)).

59. *Id.* at 881 (discussing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (in *Banco Nacional* the Supreme Court decided not to exercise jurisdiction over the case because the wrong in the case merely represented the differing views of capitalist and socialist nations and not necessarily an act that was condemned by civilized nations)).

60. *Id.* at 881-85; *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

61. *Id.* at 885.

62. *Id.*

63. *Id.* at 886 ("The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.")

64. *Id.*

rights already recognized by international law."[65] With that statement, the Second Circuit recognized the ATCA could be used by aliens to redress any wrong by a state actor that violated established international law.

Filartiga ushered in the federal courts' modern view on international law and how it could be applied in the United States judicial system. The Second Circuit's decision in *Filartiga* reflected a belief that international law had a place in federal jurisprudence because international law formed a basis of this country's common law. With that belief, the court held that federal courts could deem States responsible for their actions when those actions violated international law. Subsequent decisions would further clarify how the ATCA could form the basis for lawsuits in the United States.

B. Iwanowa v. Ford Motor Co.: The Liability of Private Entities Under the ATCA

The dispute in *Iwanowa* arose out of crimes committed during World War II. During that time, Ford Motor Company had a plant in Germany operated by its German subsidiary, Ford Werke.[66] The complaint alleged that during the war the Nazis confiscated the Ford Werke plant and used it to produce military vehicles.[67] In order to operate the plant at a high capacity, the Nazis used forced labor.[68] This forced labor contingent consisted of prisoners taken by the Nazis during their military operations. The Nazis sold some of these prisoners to Ford Werke to work in its plant.[69]

The Nazis took Plaintiff Iwanowa captive in Rostov, Russia in 1942.[70] Ford Werke purchased her and transported her to Ford Werke's plant in Cologne.[71] Once there, she and others were forced to perform heavy labor, for no pay, while periodically being beaten by security officials.[72] Iwanowa and the rest of the workers were freed by Allied Forces in 1945. Iwanowa brought a class action suit against Ford Werke and its parent company, Ford Motor Co., in 1998.[73] Specifically, Iwanowa sought damages for restitution of unjust enrichment and damages for the pain and suffering caused by the working conditions.[74]

During litigation of the suit, Defendants filed a motion to dismiss arguing that United States federal courts lacked subject matter jurisdiction to hear the case.[75] Iwanowa argued that the ATCA granted subject matter jurisdiction over her claim because Defendants' actions during World War II violated the law of nations.[76]

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65. *Id.* at 887.
66. *Iwanowa*, 67 F. Supp. 2d at 432.
67. *Id.*
68. *Id.*
69. *Id.* at 432-33.
70. *Id.* at 433.
71. *Id.*
72. *Id.* at 434.
73. *Id.*
74. *Id.*
75. *Id.* at 437-38. Defendants filed a 12(b)(1) motion to dismiss the claim and the court treated it as a factual attack on the pleadings rather than a facial attack.
76. *Id.* at 438-39 (Discussing that if Iwanowa had claimed subject matter jurisdiction under the

Defendants challenged the use of the ATCA by saying that Congress did not intend it to be a private cause of action and also that the ATCA applied only to State actors and not private actors.[77] In response, the court looked to case law and congressional action, and found that the ATCA did provide for a private right of action. Following a previous Second Circuit case, the court reasoned that, after *Filartiga*, Congress had a golden opportunity to amend the ATCA when it passed the Torture Victim Protection Act ("TVPA"),[78] but chose not to do so.[79] The court emphasized the fact that Congress chose not to address the issue of a private cause of action under the ATCA even though it could have addressed the issue using the TVPA.[80] The court also drew attention to the fact that the Eleventh Circuit recognized the ATCA as creating a private right of action after *Filartiga*.[81] Given the tacit support of other court decisions and the implicit support of Congress, the court in *Iwanowa* recognized the ATCA as granting a private right of action.[82]

The court next considered whether the ATCA could apply to a non-state actor. In reaching its conclusion on this issue the *Iwanowa* court relied on the Second Circuit's opinion in *Kadic v. Karadzic*.[83] The *Kadic* decision recognized that individuals could be held liable for certain violations of international law, which included slave labor.[84] Turning to numerous sources of international law and U.S. case law, the court in *Iwanowa* held that forced or slave labor was a clear violation of the law of nations.[85]

The *Iwanowa* court recognized that forced labor or slave labor violated *jus cogens* norms.[86] The court explained, "*Jus cogens* norms are a narrow subset of the norms recognized as customary international law."[87] *Jus cogens* violations are determined by looking at the treaties and commentary regarding international law to determine whether the international community recognizes a norm to be so fundamental as to make it nonderogable.[88] If a private entity commits a violation of *jus cogens* norms then it can be held liable as a private entity without being

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Geneva or Hague Conventions, her claim would have been dismissed because the ATCA only applies to self-executing treaties. However, because Iwanowa claimed a violation under the "law of nations" her suit was able to go forward. Iwanowa met the first requirement of the ATCA (that the person bringing the suit be an alien) because she was a citizen of Belgium.)

77. *Id.* at 441.

78. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

79. *Iwanowa*, 67 F. Supp. 2d at 442-43 (citing Jama v. INS, 22 F. Supp. 2d 353, 363 (D.N.J. 1998)).

80. *See Iwanowa*, 67 F. Supp. 2d at 443. (discussing how the Torture Victim Protection Act ("TVPA") was passed after *Filartiga* as an amendment to the ATCA, which would have given Congress the perfect opportunity to address any concerns it had with the ATCA.)

81. *Id.* (citing Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996)).

82. *Iwanowa*, 67 F. Supp. 2d at 443.

83. *Id.* at 445 (citing *Kadic*, 70 F.3d 232 (2d Cir. 1995)).

84. *Kadic*, 70 F.3d at 240.

85. *Iwanowa*, 67 F. Supp. 2d at 439-41.

86. *Id.* at 441.

87. *Id.* at 441 n.18 (citing Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988)).

88. *Iwanowa*, 67 F. Supp. 2d at 441 n.18.

involved in the action with a State actor. [89] The *Iwanowa* court explained that *Kadic* recognized liability for private entities for violations of *jus cogens* norms.[90] According to the court, *Kadic* represented the most recent view of international law, and since international law is in a constant state of flux, *Kadic* carried greater weight than other earlier opinions because it more closely reflected the current state of international law.[91] Given the reasoning in *Kadic*, the *Iwanowa* court accepted the view that private entities could be held liable – outside of state action – for violations of *jus cogens* norms under international law.[92]

In the end, Defendants in the *Iwanowa* case were successful in obtaining a dismissal because the suit was barred due to the running of the statute of limitations, treaties made at the conclusion of World War II, and the political question doctrine.[93] While Plaintiff may have lost, the court in *Iwanowa* added to the potential reach of the ATCA by supporting liability solely for private entities for violations of *jus cogens* norms.

C. Wiwa v. Royal Dutch Petroleum Co.: The "Joint Action" Theory

The injuries claimed in *Wiwa* were brought about by a corporation using a local military to support its operations.[94] Plaintiffs brought this case against the Royal Dutch Petroleum Company and Shell Transport and Trading Company, its subsidiaries, the Shell Petroleum Company and Shell Development Company of Nigeria, Ltd. (collectively "Royal Dutch"), and the president of the Nigeria subsidiary, Brian Anderson.[95] The crimes alleged in *Wiwa* occurred during the 1990's when Royal Dutch was engaged in extracting oil from land belonging to the Ogoni people in Nigeria.[96] Plaintiffs claimed that Royal Dutch used the Nigerian

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89. Although *Iwanowa* recognized liability for private entities based on *jus cogens*, it is important to note that *jus cogens* violations merely negate the state action requirement for private entities to be liable under the ATCA. Private entities can still be liable under the ATCA outside of *jus cogens* violations if their actions are intertwined with a State's, but there must be a showing of state action to make the case. *See id.* at 441 ("*jus cogens* norms are a narrow subset of the norms recognized as customary international law.") (citing *Reagan*, 859 F.2d at 940) *and id.* at 443 ("[i]nstead, we hold that certain forms of conduct violate the law of nations *whether undertaken by those acting under the auspices of a state or only as private individuals.*") (emphasis added) (quoting *Kadic*, 70 F.3d at 239).

90. "The *Kadic* court concluded that the inclusion of 'slave trade' within both sections 702 and 404 of the Restatement demonstrates that this in an offense of 'universal concern' for which non-state actors may be liable." *Iwanowa*, 67 F. Supp. 2d at 444 (quoting *Kadic*, 70 F.3d at 240).

91. *Iwanowa*, 67 F. Supp. 2d at 444-45 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992)).

92. "No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law." *Iwanowa*, 67 F. Supp. 2d at 445. The court in *Iwanowa* accepted the view that private individuals could be held accountable for violations of international law, but the court did not find a basis for invoking the ATCA because it felt that Plaintiff proved that Defendants were de facto State actors. *Id.*

93. *Id.* at 491.

94. *Wiwa*, 2002 WL 319887, at *1.

95. *Id.* at *1-2.

96. *Id.* at *2.

military and police to support and protect its oil excavation operations in the area.[97] The complaint claimed that Plaintiffs and other Ogoni residents were tortured, raped, and murdered by the police and military who provided support to Royal Dutch.[98]

The court decided that in order for Plaintiffs to move forward with their ATCA claims they would have to prove state action by Defendants.[99] The court reasoned that the crimes enumerated in the complaint fell short of the narrow set of crimes that do not require a showing of state action (*jus cogens* violations).[100] Because the Plaintiffs had to show state action, the court determined that the proper test to apply in determining state action was the "joint action" test.[101] Under the "joint action" test, private entities are found to be state actors – thus state action exists – if those private entities willfully participate in joint action with a State.[102] Defendants argued that the evidence was insufficient to show that Royal Dutch collaborated with the Nigerian government to violate international law.[103] The court found otherwise and decided that Plaintiffs did have a cause of action under the ATCA.[104]

The complaint cited numerous instances in which Royal Dutch cooperated with, and directed, the Nigerian police and military. Plaintiffs alleged that Royal Dutch purchased weapons for the Nigerian police, helped plan raids against the Ogonis, provided materiel to the military and police, and even ordered violent responses against any kind of anti-Royal Dutch activities.[105] The court also held that the claims against Brian Anderson as a private individual were actionable under the ATCA for the same reasons they were actionable against Royal Dutch as a corporation.[106] Defendants attempted to argue that Plaintiffs had to produce evidence showing collaboration between Royal Dutch and the Nigerian government for each alleged act.[107] The court disagreed with this argument saying that §1983 – which the court used to evaluate what state action meant – did not

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97. *Id.*

98. *Id.* The complaint contained 12 different claims including claims of negligence, intentional infliction of emotional distress, and RICO, but the other claims are not pertinent to the analysis of the ATCA.

99. *Id.* at *12-13. State action is defined as "Anything done by a government; esp., in constitutional law, an intrusion on a person's rights (esp. civil rights) either by a governmental entity or by a private requirement that can be enforced only by governmental action (such as a racially restrictive covenant, which requires judicial action for enforcement)." BLACKS LAW DICTIONARY 672 (3rd Pocket ed. 2006).

100. *Id.* at *12. Even though some of the incidents complained of involved summary execution and torture, the court found that Plaintiffs had to show state action since those violations were not committed in the course of genocide or war crimes (citing *Kadic*, 70 F.3d at 243).

101. *Wiwa*, 2002 WL 319887, at *13; *see* 42 U.S.C. § 1983 (2006). The *Wiwa* court looked to § 1983 as the standard by which private actors act under color of law with respect to the ATCA.

102. *Wiwa*, 2002 WL 319887, at *13.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at *14-15.

107. *Id.* at *14.

require a showing of concerted action for each specific act.[108] Because Plaintiffs demonstrated sufficient collaboration to show state action they did not have to make individual showings of collaboration for each act.[109]

The *Wiwa* opinion represents the recognition of an avenue by which state action can be proven under the ATCA. This allows for the application of the ATCA to private entities for crimes outside of the limited set of *jus cogens* violations. As long as plaintiffs can show a substantial collaboration between a private entity and a government to violate international law then they can bring claims redressing their resulting injuries under the ATCA.

D. Doe v. Unocal: Aiding and Abetting Under the ATCA

In this case, Plaintiffs filed a class action lawsuit against Unocal and others on behalf of "tens of thousands" of people Plaintiffs said were injured by the actions of Unocal.[110] *Unocal* arose out of conduct similar to that in *Wiwa*. The injuries in the case occurred because of a Unocal project to extract natural gas from Myanmar and transport it via pipeline through Thailand where it could be shipped across the world.[111] At this time Myanmar was controlled by the military and the military "provided security and other services" to Unocal's project.[112] During the project, local villagers living near project areas alleged that the "security detail" engaged in numerous human rights violations including: murder, rape, torture, and forced labor.[113] Plaintiffs brought claims under the ATCA, alleging that Unocal worked with the military junta controlling Myanmar at the time to perpetrate these crimes and further the business interests of Unocal.[114]

Defendants in this case tried to argue that, as a private entity, they could not be held liable under the ATCA because their conduct did not equate to state action.[115] The court held that Unocal's conduct violated *jus cogens* norms, and therefore, Plaintiffs did not have to prove state action.[116] The crimes obviating the need for state action included murder, rape, torture, and forced labor.[117]

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108. *Id.*

109. *See id.*

110. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002). Unocal purchased 28% of a project in Myanmar from the French company, Total S.A. Unocal also owned the Union Oil Company of California which is actually the company that purchased the interest in the project from Total S.A. *Id.* at 937.

111. *Id.* at 936-37.

112. *Id.* at 937-38. According to a Unocal memorandum, four battalions of 600 men each were assigned to protect the pipeline corridor and each survey team had a security detail of 50 soldiers each. *Id.* at 938.

113. *Id.* at 939. Reports alleged that the Myanmar military forced villagers to work on the project and those that refused or tried to escape were tortured and/or killed. The military also allegedly raped villagers as well. *Id.* at 939-40.

114. *Id.* at 942-44.

115. *Id.* at 945-46. The court admits that in most instances, in order to bring a claim under the ATCA, the crimes committed must rise to the level of "state action."

116. *Id.*; *see also Iwanowa*, 67 F. Supp. 2d at 445.

117. *Unocal*, 395 F.3d at 946 (citing *Kadic*, 17 F.3d at 243-44).

Plaintiffs argued that Defendants were liable under the ATCA because they aided and abetted the Myanmar military in perpetrating violations of international law.[118] While aiding and abetting was a new argument under the ATCA, the court found it persuasive. It reasoned that the standard for aiding and abetting under the ATCA was "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[119] The *Unocal* court based this standard on aiding and abetting standards set by the International Criminal Tribunals for Yugoslavia and Rwanda.[120] Furthermore, the court held that the *mens rea* required for the crime of aiding and abetting was that the defendant must have knowledge, but intent was not necessary.[121]

The court concluded that sufficient evidence existed to create a genuine issue of material fact on the allegation of forced labor, murder, and rape,[122] and thus reversed the district court's ruling and remanded the case back for further consideration.[123] In regard to the forced labor claims, the court reasoned that Unocal showed the Myanmar military where to provide security and infrastructure and did so with the *knowledge* that the military in that country had a history and tendency to use forced labor.[124] Furthermore, the court found that the forced labor would not have occurred but for Unocal hiring the Myanmar military to provide security for the project.[125] The court made similar findings on the claims of murder and rape. It said that the actions of Unocal amounted to "practical assistance" and had a "substantial effect" on the military's ability to carry out these violations against the local villagers.[126] This assistance occurred when Unocal provided the military with intelligence on where to carry out security operations.[127]

The decision in *Unocal* further expanded the reach of the ATCA. It supported the decision in *Iwanowa* that certain crimes do not require the actor's conduct to rise to the level of state action in order for the ATCA to apply. Furthermore, *Unocal* created an aiding and abetting standard which could apply liability under the ATCA. This aiding and abetting standard created a lower threshold to implicate the use of the ATCA. In Unocal's case, the Ninth Circuit held Plaintiffs met their burden by showing Unocal *knew* of the Myanmar military's penchant for human rights abuses and told the military where to provide security and support.

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118. *Id.* at 947.

119. *Id.*

120. *Id.* at 949-50; *see* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 209, 234 (Dec. 10, 1998); Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgment and Sentence, ¶ 114 (Jan. 27, 2000).

121. *Unocal*, 395 F.3d at 951 (citing *Musema* at ¶ 180-81).

122. *Id.* at 956 (The court concluded that there was not sufficient evidence to create a genuine issue of material fact in regards to the claims of torture.).

123. *Id.* at 953 (reversing the District Court's grant of summary judgment on the ATCA claims in regards to forced labor) *and id.* at 956 (reversing the District Court's grant of summary judgment on the ATCA claims in regards to murder and rape).

124. *Id.* at 952; *see also id.* at 940 (discussing the fact that Unocal had several warnings that the military in Myanmar often engaged in human rights violations).

125. *Id.* at 952-53.

126. *Id.* at 955.

127. *Id.*

IV. *ABTAN, ET AL. V. BLACKWATER LODGE AND TRAINING CENTER, INC., ET AL.*: RESPONSE TO THE MASSACRE AT AL-NISOOR SQUARE

On October 11, 2007 the case of *Estate of Himoud Saed Abtan, et al. v. Blackwater USA, et al.*, was filed in the U.S. District Court for the District of Columbia where the plaintiffs claimed Blackwater was liable under the ATCA.[128] The suit was filed in response to the September 16, 2007 al-Nisoor Square incident.[129] The complaint claimed that heavily armed Blackwater personnel opened fire on innocent civilians in al-Nisoor Square resulting in multiple deaths and injuries.[130] The suit named seven plaintiffs and thirteen defendants, which included all of Blackwater and its subsidiaries as well as Erik Prince as an individual.[131]

This case will mark an important milestone in attempting to hold government contractors – especially private security contractors – accountable for their actions overseas. The plaintiffs' success or failure and how the ATCA is interpreted in this case are important because they could affect the number of future suits and how they will proceed. The *Abtan* complaint alleges the following counts: 1) war crimes; 2) assault and battery; 3) wrongful death; 4) intentional infliction of emotional distress; 5) negligent infliction of emotional distress; and 6) negligent hiring, training, and supervision.[132]

The *Iwanowa* court held that the ATCA does create a private cause of action and that the ATCA can be applied to private individuals.[133] *Iwanowa* also discussed how the violation of the narrow subset of *jus cogens* norms obviates the need to prove state action to advance a case under the ATCA.[134] The addition of war crimes to the counts in *Abtan* could create a situation in which Plaintiffs would not have to prove state action under that count in order to recover under the ATCA. However, the meaning of "war crimes" is unclear in the *Abtan* complaint and without that specificity, determining whether Plaintiffs will not have to prove state action on all the counts is difficult.

Plaintiffs in *Abtan* will most likely have to proceed under the reasoning set forth in *Wiwa* and prove state action in order to hold Blackwater accountable under the ATCA. Again, the *Wiwa* court used the "joint action" test to determine state action as it applies to the ATCA.[135] In order to satisfy the "joint action" test,

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128. *See* Center for Constitutional Rights, current cases, http://ccrjustice.org/ourcases/current-cases/atban%2C-et-al.-v.-blackwater-usa%2C-et-al. (last visited Oct. 4, 2008); *see also Abtan* No. 1:07-cv-01831 (D.D.C. second amended complaint filed March 28, 2008). On March 28, 2008 the original case was joined with another suit filed by the family of another of the Iraqis killed in the attack and nine of the injured Iraqis, changing the name of the case to *Abtan, et al. v. Blackwater Lodge and Training Center, Inc., et al.* http://ccrjustice.org/ourcases/current-cases/atban,-et-al.-v.-blackwater-usa,-et-al.

129. *Abtan*, No. 1:07-cv-01831 at 2.

130. *Id.* at 3.

131. *Id.* at 4-7.

132. *Id.* at 16-19.

133. *Iwanowa*, 395 F.3d at 946-47.

134. *Id.* at 945-46.

135. *Wiwa*, 2002 WL 319887, at *13.

plaintiffs must show that a private entity willfully participated in actions with a State to violate international law.[136] The *Wiwa* court found willful participation when Royal Dutch used the Nigerian police and military to protect their oil ventures in the country.[137] In *Wiwa* a State's forces were operating under the direction of a private entity. The opposite is true in *Abtan*. In *Abtan*, a private entity is acting under the orders of a State (the United States) rather than the other way around; thus, the case is factually different from *Wiwa* in a very basic, and possibly important way. However, the "joint action" test merely requires willful participation by a private entity and a State to break international law.[138] If the "joint action" test can apply to a private entity giving orders to a State, then the test should be applied to a State giving orders to a private entity.

The true hurdle of the "joint action" test is proving willful participation by the State and private entity. Such evidence seems to exist in the *Abtan* case. The aforementioned memorandum to the House Committee for Oversight and Government Reform references two incidents in which the State Department worked with Blackwater to essentially cover up incidents in which innocent Iraqis were killed. One incident involved a drunken Blackwater employee who shot and killed one of the Iraqi Vice President's guards.[139] Another incident referenced in the memorandum occurred when Blackwater contractors killed an innocent bystander in June 2005.[140] The Blackwater personnel failed to report the incidents and even tried to cover up their existence.[141] The State Department did not conduct an investigation as to criminal liability in either incident, and instead negotiated with Blackwater to pay $15,000 and $5,000 respectively for each incident.[142] The State Department chose to use these measures as an effort to quickly dispose of the incidents.[143]

The evidence reported in the House memorandum shows cooperation between the State Department and Blackwater to avoid thorough investigations into incidents where innocent people were injured or killed. The information in that memo shows that the State Department was aware of incidents that violate criminal laws, but did not take the necessary procedures to remedy the situation and actually tried to cover them up. In response to the killing of the innocent bystander,

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136. *Id.*

137. *Id.*

138. *Id.*

139. BLACKWATER MEMORANDUM, *supra* note 33, at 9-11. The above mentioned incident happened when the Blackwater employee attempted to enter the Iraqi Prime Minister's compound. The employee was confronted by one of the Vice President's guards and the employee shot him three times with a Glock 9mm handgun. The employee fled the scene and was apprehended a few hours later in his room at the Blackwater compound in Baghdad. When he was apprehended he was determined to be too drunk to be questioned. The consequences for his actions were that his contract with Blackwater was terminated and he was flown home to the United States. *Id.*

140. *Id.* at 12.

141. *Id.* at 12-13.

142. *Id.* at 2.

143. *Id.* at 12 (In response to the killing of the innocent bystander, correspondence inside the State Department said, "[W]e are all better off getting this case – and any similar cases – behind us quickly.").

correspondence inside the State Department said, "[W]e are all better off getting this case – and similar cases – behind us quickly."[144] The quote by the State Department official shows that the U.S. government knew that these violations happened and that they will continue to happen, but that the government will continue to resolve disputes by paying relatively small sums of money and avoiding real investigation. Further demonstrating this point, following the incident involving the Iraqi Vice President's guard, a State Department official proposed a $250,000 settlement to the family and then reduced it to $100,000.[145] Other State Department officials rejected both proposals as being much too large because setting such a precedent would be very costly for the government.[146] This type of reasoning is more evidence of the State Department's knowledge that such incidents happened and will continue to happen, and that they do not want to properly respond with an investigation and would rather just pay money to cover the incidents up.

Plaintiffs still have a long row to hoe in proving state action through the "joint action" test. Since much of the evidence to prove state action is to be found in internal State Department and Blackwater communications, and communications between the State Department and Blackwater, evidence could prove difficult to acquire. However, if the evidence can be obtained, a court could very well find that state action exists.

The communications revealed in the House memorandum show a desire by a State to cover up actions by a private entity that violate customary international law. The communications also show that the State Department expects similar incidents in the future and plans on dealing with those incidents in a similar way – by not performing official investigations and using small monetary settlements to keep incidents quiet. Because Blackwater mainly operates in Iraq under contracts with the State Department to protect State Department officials,[147] this cooperation between the State Department (a State agency) and Blackwater (a private entity) could represent state action and expose Blackwater to liability.

V. CONCLUSION

Accountability and oversight for private security contractors continues to be a major problem in the wars in Iraq and Afghanistan.[148] Right now, the major security contractors in Iraq are Blackwater, Aegis, Dyncorp, Erinys and Triple Canopy.[149] All five of these companies are connected to questionable practices in carrying out their contracts. Aegis is a British security run by a former British military officer named Tim Spicer.[150] Spicer has a history of committing

144. *Id.*

145. *Id.* at 11.

146. *Id.*

147. *Id.* at 4 (Blackwater has been awarded over $1.5 billion worth of contracts with the State Department between 2004 and 2006.).

148. PRIVATE SECURITY CONTRACTORS MEMORANDUM, *supra* note 17, at 7.

149. *Id.* at 2.

150. SCAHILL, *supra* note 3, at 159.

violations against civilian populations in his history as a mercenary.[151] Aegis was accused of committing similar violations in Iraq when internet videos were posted depicting Aegis contractors firing on civilian vehicles in Iraq.[152] The Erinys contingent in Iraq is commanded by former South African mercenaries.[153] The same House memorandum that focuses on Blackwater also mentioned Dyncorp and Triple Canopy. The report said that, while Blackwater was the biggest offender as far as unacceptable behavior, DynCorp and Triple Canopy combined for 138 shooting incidents in Iraq from 2005 to 2007.[154] In 62% of their shooting incidents, DynCorp fired first and in 83% of Triple Canopy's they fired first.[155]

These statistics regarding private security contractors show that a great deal of abuse by contractors goes unaddressed. The "joint action" test has the potential to apply not only to action between the U.S. and private contractors, but also potentially to action between the new Iraqi government and private contractors. Security contractor Erinys reportedly built up a 14,000 man private army in Iraq that was partly comprised of Iraqis. That kind of cooperation between a security contractor and a State is similar to the cooperation in *Unocal* and opens up the door for these private entities to use Iraqi forces to commit war crimes or allows contractors to aid Iraqi forces in committing war crimes.

The *Abtan* case represents only one instance in which a private security contractor could be held accountable for its actions overseas. The various types of jobs these contractors do and the various amounts of cooperation they get from State actors could allow for ATCA liability under all the theories mentioned here. Watching how the *Abtan* case unfolds is important because the decision in the case and the application of the ATCA could have major effects on holding private security contractors liable in the future.

151. *Id.* at 159-60 (Spicer owned and operated another private military firm, Sandline, fighting in Papua New Guinea and Sierra Leone, that was accused use of excessive force against civilians.).

152. *Id.* at 161; *see* Videotape: DailyMotion.com, http://www.dailymotion.com/video/x34kfm_british-mercenarys-in-iraq (October 4, 2007) (last visited Oct. 4, 2008).

153. SCAHILL, *supra* note 3, at 77.

154. BLACKWATER MEMORANDUM, *supra* note 33, at 7

155. *Id.*

PLACES OF REFUGE FOR SHIPS

JOHN E. NOYES*

PLACES OF REFUGE FOR SHIPS: EMERGING ENVIRONMENTAL CONCERNS OF A MARITIME CUSTOM (Aldo Chircop & Olof Linden eds., Martinus Nijhoff Publishers 2006).

I. INTRODUCTION

The damaged tankers *Erika* and *Prestige*, denied access to ports or other places of refuge, sank in 1999 and 2001, respectively.[1] They spilled their cargoes of oil, wreaking much environmental damage on French and Spanish coastlines and damaging the fishing and tourist industries. Another ship in distress, the *Castor*, was towed around the Mediterranean for over a month in 2001, having been denied entry by numerous states, before its cargo of gasoline was safely offloaded at sea.[2] Denying refuge to a damaged tanker may alleviate understandable anxieties of local authorities, but this course of action may also render salvage operations impossible and contribute to an environmental catastrophe that could have been avoided.

When foreign flag vessels in distress seek access to places of refuge, complex problems arise. The issue of access to places of refuge illustrates how difficult it is to arrive at a new legal consensus when changes in technology and social attitudes challenge traditional legal understandings – in this case, the customary international law right of refuge in internal waters.[3] Competing legal perspectives,

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1. Gwendoline Gonsaeles, *The Impact of EC Decision-Making on the International Regime for Oil Pollution Damage: The Supplementary Fund Example*, *in* MARINE RESOURCE DAMAGE ASSESSMENT: LIABILITY AND COMPENSATION FOR ENVIRONMENTAL DAMAGE 100 (Frank Maes ed., 2005).

2. Int'l Maritime Org. [IMO], *"Places of Refuge" – Addressing the Problem of Providing Places of Refuge to Vessels in Distress*, http://www.imo.org/Safety/mainframe.asp?topic_id=746 (last visited Sept. 15, 2008).

3. By contrast, many authorities deny the existence of a general customary international law right of entry into port for foreign flag vessels that are not in distress. *See, e.g.*, A.V. Lowe, *Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597, 597-98 (1977). Some authorities limit the concept of "vessels in distress" to those in which a vessel is in difficulty and human life is at risk, using the terminology "vessels in need of assistance" to refer to situations in which a vessel is in difficulty but there is no risk to human life. *See, e.g.*, PLACES OF REFUGE FOR SHIPS: EMERGING ENVIRONMENTAL CONCERNS OF A MARITIME CUSTOM 348 (Aldo Chircop & Olof Linden eds., 2006) [hereinafter PLACES OF REFUGE FOR SHIPS]; *see also infra* text accompanying note 15. This essay, in accordance with much standard commentary, refers to "vessels in distress" as encompassing situations

reflecting the concerns of various affected constituencies, vie for prominence. The appropriate recourse is to some expert process in which these various concerns can be evaluated in light of specific risk factors involved in each particular catastrophe. What process should be used? Can all significant constituencies – ship owners, cargo owners, their insurers, salvage interests, ports and coastal communities, environmental and "international community" interests – participate? What are the prospects for developing a legal process that operates quickly and efficiently, that permits input from experts, and that accommodates essential interdisciplinary perspectives?

This essay first provides an overview of *Places of Refuge for Ships*, a book that contains essential information and perspectives for lawyers and policy makers. Part III then briefly explores why the issue of places of refuge is daunting. The reasons for the complexity of this issue set the scene for Part IV, which proposes a process-oriented approach to assess and manage risks where vessels in distress seek access to places of refuge.

II. OVERVIEW OF *PLACES OF REFUGE FOR SHIPS*

Places of Refuge for Ships addresses its topic through a multidisciplinary lens. Part I of the book highlights management perspectives on problems associated with places of refuge. Part I's first chapter, written by one of the book's co-editors, Aldo Chircop of Dalhousie Law School, examines the International Maritime Organization's influential, though legally nonbinding, 2003 Guidelines on Places of Refuge for Ships in Need of Assistance.[4] The second chapter, prepared by the other co-editor, Olof Linden of the World Maritime University in Sweden, explores coastal and ocean management, developing the important theme that the problem of places of refuge should be addressed through an integrated interdisciplinary approach, rather than through resort to rules that regulate marine activities based primarily on a vessel's nationality or location. Part I also contains four other chapters, on the environmental component of the IMO Guidelines (William Ritchie), risk assessment and decision making by maritime administrations (Jens-Uwe Schröder), port perspectives (Rosa Mari Darbra Roman), and the roles of the media in covering maritime disasters (Mark Clark).

Part II, on legal and policy analysis, contains the bulk of the book's treatment of international law. Aldo Chircop has contributed two solid chapters, one on the customary law of refuge for ships in distress and another on international environmental law considerations. Part II also includes chapters on refuge and salvage (Proshanto K. Mukherjee), compensation for damage (Gaothard Mark Gauci), insurance (Patrick Donner), and recovery in general average[5] in cases of refuge (Hugh Kindred), which serve as useful introductions to these topics.

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in which human life either is or is not at risk.

4. IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Assemb. Res. A.949 (23) (Dec. 5, 2003) [hereinafter IMO Guidelines].

5. General average is the maritime law mechanism for sharing proportionately the losses and expenses that a ship's master has deliberately incurred to avoid or minimize damage when a ship has encountered danger. *See* PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 347-48.

The third and final Part of *Places of Refuge* evaluates various national approaches concerning places of refuge, with a particular focus on process in federal states. It contains chapters on Australia (Sam Bateman and Angela Shairp), Belgium (Eric Van Hooydonk), Canada (Philip John), Denmark (John Liljedahl), Germany (Uwe Jenisch), the United Kingdom (Toby Stone), and the United States (Paul Albertson).

The problem of refuge has no easy answers. The challenge thus becomes to devise procedures that allow stakeholders to be heard and risks to be effectively assessed and managed in the face of often conflicting values and incentives. In order to understand this challenge, it is important to appreciate why the issue of places of refuge is complex.

III. THE COMPLEXITY OF THE ISSUE OF PLACES OF REFUGE

The law concerning places of refuge, and more generally concerning ships in distress, is undoubtedly complex. It has been so for years, and has recently become more so, for several reasons. First, decisions about ships seeking refuge reflect a range of increasingly conflicting values. Second, multiple stakeholders hold these conflicting positions intensely. The matter of vessels seeking refuge is salient and politically sensitive. Third, it is difficult, ex ante, to devise a clear rule concerning how cases involving vessels in distress seeking places of refuge should be resolved. The treatment of such vessels depends on many variables: the condition of the ship, its location, its cargo, its insurance coverage, the availability and capabilities of ports and salvors, and weather.

First, decisions about places of refuge implicate many different values. The resulting complexity is not entirely new. Rules applicable to ships in distress have historically derived from different fields of international law. Trade law, humanitarian law, the law of armed conflict, admiralty law, the law of the sea, and (a newer development) international environmental law are all relevant. Different fields of law prioritize different (and sometimes competing) concerns: the integrity of ships and their cargoes, the sanctity of lives put in peril when ships are in distress, the navigational freedom and immunity of warships, a coastal state's ability to protect itself and to apply its laws when an appropriate jurisdictional nexus exists, and the global importance of sustainability and non-degradation of the environment. *Places of Refuge* ably explores many of these legal traditions.

Value conflicts related to places of refuge have intensified in recent decades. The predominant humanitarian rationale for a right of access of vessels in distress to a place of refuge – a right often asserted as existing in customary international law[6] – has been undermined. This is so because of changes in technology. These

6. *See* PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 191-92, 221-22. Pages 191-92 assess the contours of the refuge custom at the end of the nineteenth century, including what perils triggered a right of refuge, what types of vessels enjoyed the right, special rules concerning warships, where refuge could be enjoyed, the right of free departure, and other rights and privileges related to refuge (e.g., concerning repairs, re-supply, unloading cargo, exemption from customs duties, and the right to consular assistance). Pages 221-22, discussing the current views of the Comité Maritime International

changes have helped to minimize the danger to humans, but have increased the risk of damage from ships. Traditionally, access to places of refuge was often necessary in order to save the lives of people on board a ship in distress. Refuge thus linked to a broader duty of assistance that also found expression in the international law rule that vessels have a duty to render assistance to those in danger of being lost at sea.[7] Today, however, technology permits precise location of ships in distress, and passengers and crew members on board such ships often can be offloaded by helicopter or ship. Yet the need to insure the safety of the crew and passengers on board a vessel in distress never completely explained the customary international law rule allowing access to ports or places of refuge in situations of distress, for the rule also supported the interests of ship and cargo owners and the value of open commerce. These latter rationales remain, but they have come into increasing tension with environmental values.

Modern ships pose dangers that older vessels did not. Spills of oil or hazardous cargoes from tankers may devastate the marine environment or threaten the health and safety of coastal communities. These risks have been addressed through a variety of initiatives directed at vessel safety and restricting access of vessels to Particularly Sensitive Sea Areas.[8] Yet these preventive measures are not the only ways to respond to increased environmental risks. The Law of the Sea Convention and other treaties also incorporate protective jurisdictional principles, allowing coastal states to counteract environmental threats from marine casualties.[9] These protective principles provide a conceptual basis for qualifying the traditional customary right of access to places of refuge.[10] State practice has moved toward

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and its national delegations, refer to a customary international law right of refuge, but note that many states no longer regard the right as absolute. *See also infra* text accompanying note 12.

7. *See, e.g.*, International Convention on Salvage art. 10, Apr. 28, 1989, S. TREATY DOC. NO. 102-12 (1991), 1953 U.N.T.S. 193; United Nations Convention on the Law of the Sea art. 98, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter Law of the Sea Convention]; International Convention on Maritime Search and Rescue Annex ¶ 2.1.10, Apr. 27, 1979, T.I.A.S. No. 11,093, 405 U.N.T.S. 97.

8. On-board vessel safety devices and procedures have traditionally been mandated by requirements of the International Convention on the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 3. *See* Law of the Sea Convention, *supra* note 7, art. 94. The European Union has pushed for a range of other initiatives, including the phasing out of single hull tankers, the enhancement of flag state control, port state inspections of substandard vessels, coastal state control over foreign vessels in transit, and the designation of Particularly Sensitive Sea Areas. *See generally* Veronica Frank, *Consequences of the Prestige Sinking for European and International Law*, 20 INT'L J. MARINE & COASTAL L. 1 (2005).

9. Law of the Sea Convention, *supra* note 7, arts. 211, 221; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, 970 U.N.T.S. 211. Aldo Chircop argues that "[t]he historical practice shows that the right to refuge has frequently been subjected to conditions," e.g., limiting the movement of ships because of health quarantines. *See* PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 224. Denying a ship access to a place of refuge altogether, because it may pose risks to a coastline, is of course a more severe limitation than allowing the ship access but imposing a quarantine or other condition on it.

10. These protective principles are, however, counterbalanced by other legal principles designed to protect the marine environment, obligations that could weigh against a coastal state refusing refuge. *See* Law of the Sea Convention, *supra* note 7, arts. 192 ("States have the obligation to protect and preserve the marine environment."), 194(2) ("States shall take all measures necessary to ensure that ... pollution arising from incidents or activities under their jurisdiction or control does not spread beyond

requiring notice and consent for entry into a place of refuge, something that historically was not necessary except with respect to warships in distress.[11] Recent authorities maintain that a ship in distress does not have an absolute right of access to a place of refuge. For example, the Irish High Court of Admiralty concluded that "[i]f safety of life is not a factor, then there is a widely recognised practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede" to the request by a vessel in distress for access to a place of refuge.[12] According to Aldo Chircop, "the right, according to customary international law, for a vessel in distress to be granted a place of refuge no longer appears to be recognised by many States as an absolute right."[13]

Second, decisions about whether or on what conditions to grant access to places of refuge are difficult not only because such decisions require mediating value conflicts, but because different constituencies care deeply about the decisions. Debates in Europe following the 2001 *Prestige* incident have been particularly intense. Ship owners and cargo owners are vitally interested in assuring a place of refuge for a vessel in distress. Concerns for the safety of those on board the vessel – salvors, if not passengers and crew – and for the environment also may push toward granting access to a place of refuge. However, coastal fishing, tourist, and residential communities, which fear devastating contamination should an oil tanker break apart near them, may strongly oppose granting access to places of refuge.

Third, the issue of granting access to places of refuge is complex because whatever decision is made with respect to access of a particular vessel to a place of refuge – granting unrestricted access, or denying access, or conditioning access on meeting financial security or other conditions – along with associated decisions regarding salvage, may provide little guidance for future cases. Ships seeking refuge pose highly fact-specific dangers. It will be hard to generalize about the risks particular communities face and about how best to manage those risks.

IV. PROCESS AND THE ASSESSMENT AND MANAGEMENT OF RISKS

The diverse practice of states, some of which have granted refuge and some of which have turned away ships seeking refuge, has suggested to some the "need to elaborate clear rules."[14] Yet any bright-line substantive rule – say, one allowing an absolute right of access to vessels in distress – will be insufficiently nuanced.

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the areas where they exercise sovereign rights ...."), 195 ("In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another."), 225 (in exercising "their power of enforcement against foreign vessels, States shall not ... expose the marine environment to an unreasonable risk"). Commentators have suggested that a treaty could help to limit the liability of a coastal state that, in the face of such broadly worded principles, makes a difficult decision either granting or refusing access to a vessel seeking refuge. *See infra* note 42.

11. *See, e.g.*, PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 225.

12. ACT Shipping (PTE) Ltd. v. Minister for the Marine, [1995] 2 I.L.R.M. 30, 48.

13. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 221.

14. Frank, *supra* note 8, at 54.

Environmental risks will vary with the situation; most often, the risk of environmental degradation will be lower if a vessel is towed into a place of refuge than if it remains offshore, but the reverse may sometimes be true. Risks to human life will vary from situation to situation. Risks to a port should a vessel in distress be allowed entry will vary depending on the insurance coverage that the vessel carries and the capabilities of port and salvage facilities. The complexities associated with refuge situations suggest that the primary need is for an expert, balanced process to assess and manage the risks involved in refuge situations. The main utility of international law in this situation may be to promote a sensible risk management process, rather than to provide a bright-line rule or even to articulate values that already are generally shared (e.g., the preservation of human life and the need to protect the environment). "Rules" that can help establish such a process are certainly to be encouraged. But the central issue is, what process can best determine whether (and on what conditions) to grant access to places of refuge?

It was perhaps inevitable that a multifaceted "balancing" approach would be articulated to address the problem of access to places of refuge. The IMO has developed one notable balancing approach, in its nonbinding 2003 Guidelines on Places of Refuge for Ships in Need of Assistance. The Guidelines are intended to assist states trying to respond to a "ship in need of assistance," defined as "a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard."[15] The Guidelines do not address the rescue of persons lost at sea, but they contain provisions both for masters and salvors with respect to a ship seeking access to a place of refuge and for coastal states evaluating whether to grant refuge. According to the Guidelines, coastal states should establish a Maritime Assistance Service and develop contingency plans.[16] The Guidelines also call for event-specific assessment – determining the events causing the need for assistance, assessing risks related to the identified events (including environmental and social factors, natural conditions, coastal state contingency planning, the nature and condition of the ship and its cargo and crew, available insurance, and required financial security), and identifying available emergency and follow-up responses (including salvage).[17] The Guidelines take the position that "[w]hen permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible."[18] The focus of the Guidelines (and, implicitly, the focus of any appropriate process to address vessels seeking access to places of refuge) is on risk assessment and risk management, and on incorporating multidisciplinary perspectives.

Although the IMO Guidelines are legally nonbinding "soft law," they appear likely to influence national and regional practice. Indeed, the European Parliament

15. IMO Guidelines, *supra* note 4, ¶ 1.18.
16. *Id.* ¶¶ 3.3-3.6.
17. *Id.* ¶ 3.9. *See also id.* app. 2 ¶¶ 2.1-2.4.
18. *Id.* ¶ 3.12.

and the Council of the European Union have required EU member states to draw up plans to accommodate major commercial ships in distress, and, in doing so, to take into account the IMO Guidelines.[19] Member states' plans must "contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority"[20] – language that certainly does not recognize an absolute right to refuge.[21] As Aldo Chircop cautiously concludes, "if significant and consistent state practice in compliance with the IMO Guidelines occurs in due course, the expectations generated by the Guidelines may achieve legal significance."[22]

One should ask whether decision makers who articulate or implement balancing approaches are considering all the proper factors. The IMO Guidelines compile factors to be weighed in a non-exhaustive list.[23] If other factors are known in advance, they should be listed, to insure that decision makers will take them into account. Some additional factors could well have been added to the IMO Guidelines list that coastal states are encouraged to consider in determining whether to allow a ship in distress access to a place of refuge. For example, it could be useful to name oil spill trajectory models as a tool to complement expert analyses of the "risk of pollution."[24] In addition, the IMO Guidelines list several maritime and environmental treaties as constituting "*inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances,"[25] but they fail to note several relevant multilateral treaties.[26] One can appreciate why the IMO Guidelines are imperfect: the issue of places of refuge had been discussed only for a relatively short time when the Guidelines were developed, and they "represent the lowest common denominator among IMO member states."[27] Yet it would be desirable to list all potentially relevant factors, in order to increase the likelihood that decision makers will consider all appropriate information when they evaluate the risks associated with requests for access to places of refuge.

How should a balancing approach that stresses risk assessment and risk management be implemented? Several contributors to *Places of Refuge* note the

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19. Council Directive 2002/59, pmbl. ¶ (5), 2002 O.J. (L 208) 10 (EC).

20. *Id.* art. 20. *See also id.* art. 18(1)(b) (member states may prohibit foreign vessels from, inter alia, entering their ports in cases of "exceptionally bad weather or sea conditions," if such entry would endanger the environment or human life).

21. Regional treaties may also facilitate the use of a balancing approach to determine access to places of refuge. *E.g.*, Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea art. 16, Jan. 25, 2002, *available at* http://195.97.36.231/acrobatfiles/02IG14_Final_Act_Eng.pdf (requiring the development of "strategies" concerning places of refuge for ships that pose environmental threats).

22. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 44.

23. IMO Guidelines, *supra* note 4, ¶ 3.9.

24. *See id.* ¶ 3.11 (failing to particularize the considerations involved in determining risk of pollution).

25. *See id.* app. 1. *See also* PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 89-90.

26. *See id.* at 233 (listing five such treaties).

27. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 100; *see also id.* at 141-43 (listing standards used to implement an environmental management system).

importance of having a process that is transparent and that takes into account the perspectives of all stakeholders – ports, coastal communities, flag states, salvage interests, and ship and cargo owners (or their insurers) – as well as environmental concerns. This process should reflect an integrated coastal and ocean management framework, a topic explored in Chapter 3 of the book. It is important to accord considerable weight to the views of experts, rather than to give final decision-making authority to, say, a port commissioner who may focus too heavily on risks to one port rather than fully consider all environmental risks should a ship in distress not be granted refuge. In short, "[a]ny decision on whether to grant or refuse a place of refuge should be based on risk assessment, not on risk aversion."[28] The assessment of risks also must be carried out efficiently. When a ship in need of assistance seeks access to a place of refuge, there often is not time for prolonged deliberation about the best course of action. Complex situations must be evaluated and decisions must be reached quickly. Among the states whose procedures are surveyed in this book, the United Kingdom has adopted a system – administered through the Secretary of State's Representative for Maritime Salvage and Intervention and through the Maritime and Coastguard Agency – that usefully provides for input from experts and allows centralized decisions concerning maritime disasters and questions of refuge.[29]

An optimum risk assessment and risk management process also requires clear lines of decision-making authority. Mechanisms to address requests for refuge have developed primarily at the national level. Problems of governmental relations in federal states, however, have compounded the difficulties in fashioning sensible procedures for evaluating requests for refuge. In those states, control over port and coastal activities often has resided with local or other sub-state components of government. Several of the states whose practices are analyzed in *Places of Refuge* – Australia, Belgium, Canada, Germany, and the United States – are federal states.[30] The challenges facing federal states may not be insurmountable, but they are significant. Sam Bateman and Angela Shairp, writing about Australia, conclude that "[t]he politics of a federal jurisdiction mean that while the central government may have the power to override decisions at a state level, it will be circumspect in exercising that power. Inevitably this means that requests for refuge will be treated in an ad hoc manner."[31] Germany lacks a centralized coast guard under federal command, and "the German model is fragmented,"[32] presenting federal-Länder communications and coordination difficulties. "[T]he Belgian experience confirms that the devolution of maritime powers in a federal state may lead to legal uncertainty as to the competence of authorities involved, as well as to gaps in the statutory regime."[33] In Canada, "[t]he possibility of ...

28. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 346.

29. *See id.* at 429-53.

30. How authority is divided among the component parts of federal states varies considerably. *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW § 11.2 (2d ed. 2006).

31. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 389.

32. *Id.* at 486.

33. *Id.* at 427.

discussion on places of refuge being complicated by overlapping and intervening jurisdictions is quite likely;" the need is to "streamlin[e] and harmonis[e] federal and provincial responsibilities."[34] The United States, whose federal-state system often confuses and exasperates other countries concerned with U.S. implementation of international law, has enacted federal laws for contingency planning and responding to oil spill emergencies. The 1990 U.S. Oil Pollution Act, a response to the *Exxon Valdez* spill in Alaskan waters, and other federal environmental legislation set out the procedure.[35] Yet, this U.S. regime is not fully unified, for the OPA permits component states of the United States to maintain different limits of liability for damage caused by oil pollution.[36] The structure and politics of federal states can make it difficult to fashion efficient procedures to address threats of oil spills and requests for refuge.

The need for coordinated regional international approaches to requests for refuge also complicates efforts to design optimum procedures. When a ship in distress seeks refuge, regional consultation and coordinated regional response mechanisms may be necessary to provide the most effective emergency or salvage services or to determine which of several neighboring states can best offer an appropriate place of refuge. States have made some progress at regional coordination. The 1983 Bonn Agreement *Counter-Pollution Manual*[37] and the Baltic Marine Environment Protection (Helsinki) Commission[38] provide for regional cooperation on anti-pollution matters in general, and on places of refuge in particular. Canada engages in bilateral planning efforts with the United States, Denmark (concerning Greenland), and France (concerning St. Pierre and Miquelon).[39] U.S. authorities have also agreed to regional plans designed to coordinate responses to marine disasters.[40]

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34. *Id.* at 512.

35. For an overview of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) [hereinafter OPA], see John E. Noyes, *U.S. Oil Pollution Act of 1990*, 7 INT'L J. ESTUARINE & COASTAL LAW 43 (1992). For a discussion of U.S. legislation related to marine pollution, see John E. Noyes, *Case Study of the United States of America*, *in* VESSEL-SOURCE POLLUTION AND COASTAL STATE JURISDICTION 357 (Erik Franckx ed., 2001).

36. OPA, *supra* note 19, 33 U.S.C. § 2718 (2006).

37. BONN AGREEMENT COUNTER POLLUTION MANUAL ¶¶ 1.1.1-1.1.2. (Oct. 26, 2007), http://www.bonnagreement.org/eng/html/counter-pollution_manual/welcome.html. The *Manual* was prepared pursuant to the Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil, June 9, 1969, 973 U.N.T.S. 3. The Agreement was extended to apply to other harmful substances on Sept. 13, 1983. *See* Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, Sept. 13, 1983, 1605 U.N.T.S. 39. *See also* PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 444.

38. The Commission was established pursuant to the Convention on the Protection of the Marine Environment of the Baltic Sea Area, Apr. 29, 1992, 2099 U.N.T.S. 195 (commonly known as the Helsinki Convention). *See* PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 476-77.

39. PLACES OF REFUGE FOR SHIPS, *supra* note 3, at 522-24.

40. *See id.* at 522-23. The United States has acted unilaterally with respect to many issues related to ships in distress and oil pollution. For example, with passage of the OPA the United States demonstrated its unwillingness to join widely accepted treaties that provide for liability for damages caused by vessel-source oil spills. These include the International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, and the Convention on the Establishment of an

Whether places of refuge should be the subject of a global treaty is controversial. Nonbinding international instruments (such as the IMO Guidelines) and regional, sub-regional, or national institutions or arrangements may better carry out at least some of the various functions relevant to places of refuge – specifying policies and norms, providing information and analysis, and undertaking or supervising salvage and rescue operations.[41] It is not apparent that a global convention holds a comparative advantage over arrangements arrived at regionally with respect to such issues as: what principles should govern access to places of refuge; who should make decisions about refuge; how national responses should be coordinated; and which potential places of refuge should be designated in advance. Nevertheless, a global convention could usefully mandate and spur the adoption of appropriate expert national and regional procedural arrangements, and could offer other potential benefits as well.[42] Still, the need for effective national and regional processes will remain paramount with respect to the threshold decision of whether to afford a ship refuge.

V. CONCLUSION

Efforts to prevent environmental disasters, particularly devastating oil spills from tankers, have taken various directions, including vessel safety mandates, traffic control measures, and increased state inspections and control of vessels.[43] Yet preventive measures will not be perfect. The dilemma of whether to accord access to places of refuge may still arise when a vessel is in distress and an oil spill appears imminent.

Places of Refuge reveals just how complex the topic of the book is. The complexities stem from the multiple areas of international law related to the topic and from the multiple values and interests implicated when a ship finds itself in need of assistance. The humanitarian rationale for granting a right of access to vessels in distress has increasingly been undermined by technological developments that allow passengers and crew members to be rescued at sea. The

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International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57, and their Protocols and Amendments.

41. *See generally* Lee A. Kimball, *Whither International Institutional Arrangements to Support Ocean Law?*, 36 COLUM. J. TRANSNAT'L L. 307, 307 (1997) (discussing how the contemporary reality of ocean space presents institutional challenges that could be better approached by devolving certain responsibilities from the global to the regional level).

42. Uniform global standards might facilitate standardized salvage contracts or ship insurance, for example by specifying standards for financial security from ships seeking refuge. A global treaty addressing places of refuge could also clarify numerous uncertainties about liability for damage, particularly on the part of states that either grant or deny access to places of refuge. Some commentators and the Comité Maritime International have indeed proposed a convention on the subject, or more broadly on the management of casualties at sea. *See, e.g.*, Eric Van Hooydonk, *The Obligation to Offer a Place of Refuge to a Ship in Distress, in* CONTEMPORARY REGULATION OF MARINE LIVING RESOURCES AND POLLUTION 85, 127-28 (Erik Franckx ed., 2007); *Report on Places of Refuge Submitted by Comité Maritime International to the IMO Legal Committee*, 2004 COMITÉ MAR. INT'L Y.B. 389, *available at* http://www.comitemaritime.org/year/2004/pdffiles/YBK04-1.pdf; Comité Mar. Int'l, Draft Instrument on Places of Refuge, *available at* http://www.comitemaritime.org/worip /pdf/Places_RefugeWP.pdf. The IMO to date has declined to call for such a convention.

43. *See* Frank, *supra* note 8, at 1, 4; *supra* note 8 and accompanying text.

advent of modern tankers has also created new risks to the safety of coastal communities and to the marine environment, and international law has correspondingly incorporated protective principles that states may raise in opposition to requests for refuge. These developments have created a strong impetus for qualifying the traditional rule, stemming from bilateral treaties and customary international law, that a ship in distress had a right of access to a place of refuge.

Decisions about granting access to places of refuge and about financial security for ships entering places of refuge are necessarily highly contextual. The case for use of a transparent, streamlined, expert process to assess and manage risk factors from a multidisciplinary perspective is a strong one. Yet problems of political relations in federal states and the need for regional coordination challenge efforts to devise effective mechanisms to review requests for refuge. *Places of Refuge* provides some reason for encouragement, for it reveals that talented professionals are seeking ways to meet these challenges. Policy makers should study the book's thoughtful analyses of rules and procedural mechanisms related to places of refuge.